No. 17461 and No. 17460

United States Court of Appeals
For the Ninth Circuit

No. 17461 (formerly USDC WD Wash. No. 2543)

PACIFIC QUEEN FISHERIES, a partnership, (AUGUST P. MARDESICH, MIKE BAROVIC, JOHN BRESKOVICH, NICK JASPRICA, * * * JOHN K. VILICICH, *et al.*), d/b/a PACIFIC QUEEN FISHERIES, *Plaintiffs-Appellants,*

vs.

ATLAS ASSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, BUFFALO INSURANCE COMPANY, UTAH HOME FIRE INSURANCE COMPANY, and COMMONWEALTH INSURANCE COMPANY, *Defendants-Appellees,*

and

GEORGE HULL, WILLIAM PECK and O. E. ROYER, *Additional Parties at the Instance of the Court,*

No. 17460 (formerly USDC WD Wash. No. 2348)

(consolidated for trial with No. 2543)

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and

GEORGE HULL, WILLIAM PECK and O. E. ROYER, *Additional Plaintiffs,*

vs.

L. SYMES, *et al.* (UNDERWRITERS AT LLOYDS and CO-INSURING COMPANIES at LONDON), *Defendants-Appellees.*

DEFENDANTS'-APPELLEES' (UNDERWRITERS') ANSWERING BRIEF

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DEFENDANTS'-APPELLEES' (UNDERWRITERS') ANSWERING BRIEF

I. STATEMENT OF JURISDICTION AND PLEADINGS

A. Jurisdiction of Trial Court

The trial court had original jurisdiction of both cases, No. 2543 and No. 2348, for diversity and amount under the provisions of 28 USC §1332 (R. 249; 49-50).

B. Jurisdiction of this Court

This Court has jurisdiction of these appeals under the provisions of 28 USC §1291. *No. 17461* was formerly No. 2543; and *No. 17460* was formerly No. 2348. Both appeals are from final judgments for defendants in both cases, filed and entered March 23, 1961 (R. 288-290). Notice of Appeal was filed April 16, 1961 (R. 296).

C. Designation of Parties

Appellant partners, d/b/a Pacific Queen Fisheries, et al., plaintiffs below in both cases, are herein termed *PQF*.

Appellees, Atlas Assurance Co., et al., defendants below in No. 2543;—and L. Symes (Underwriters at Lloyds) et al., defendants below in No. 2348; are herein collectively termed *Underwriters.*

Where relevant, individuals or companies will be identified by proper name.

D. Summary of Pleadings

In former No. 2543, the Trial Court on August 25, 1960, signed a comprehensive Pre-Trial Order (R. 196-222) which superseded the pleadings (R. 221-2).

Thereafter PQF moved for an order to consolidate a State Court case, No. 137440, with No. 2543. That State Court case involved the same issues. It had been previously removed as No. 2348, but was remanded to the State Court where it was still pending when No. 2543 was set for trial (R. 46-47).

PQF's motion to consolidate was granted, and former No. 2348 was accordingly returned again to the Federal Court for trial with No. 2543 (R. 223; 46-50).

PQF's Opening Brief, pp. 52-54, now challenges non-jury trial of No. 2348. Jury trial in No. 2543 had previously been

denied on August 15, 1960, under F. R. Civ. P. 38(d) (R. 298, 312), and again under F. R. Civ. P. 39(b) on September 28, 1960 (R. 223, 224). PQF's new contention as to the non-jury trial of No. 2348 was not raised in PQF's Statement of Points, which was addressed solely to the ruling of September 28, 1960 (R. 297a; cf. R. 223, 224). Underwriters will therefore need to summarize those relevant pleadings in the argument section of this Brief in answering PQF's new issue as to non-jury trial of No. 2348 after it was consolidated on PQF's request for trial with No. 2543. That summary is stated below in Underwriters' argument concerning jury trial.

II. OPINIONS BELOW

Five substantive opinions were rendered by the Federal Court:

A. Its oral opinion at pre-trial conference denying jury trial in No. 2543 under F. R. Civ. P. 38(b), decided August 15, 1960 (R. 298, 312);

B. Its Memorandum Decision in No. 2543 determining that English Law and Usage is applicable, and denying a Motion for Jury Trial as a matter of discretion under F. R. Civ. P. 39(b), decided September 28, 1960 (R. 224-226);

C. Its Oral Decision on the facts, of November 17, 1960 (R. 227-248);

D. Its Oral Decision on the Law, of March 23, 1961 (R. 290-295); and

E. Its Findings of Fact and Conclusions of Law, of March 23, 1961 (R. 249-287).

III. COUNTER-STATEMENT OF THE CASE

A. The Omissions and Inaccuracies of PQF's Statement Require a Counter-Statement.

Underwriters also regret the need for a counter-statement of the case. It would be unnecessary except that PQF's "statement" is misleading. While PQF's statement purports to "refer liberally" to the Coast Guard Report (PQF Op. Br. 3), it is studded with omissions and inaccuracies as illustrated below, pp. 23-24.

Underwriters adopt the Findings of Fact of the Trial Court as their statement. Since PQF's Opening Brief fails to state

> "As particularly as may be wherein the Findings of Fact * * * are alleged to be erroneous." (Rule 18, subd. 2 (d)),

Underwriters have italicized all portions of the Court's Findings which appear to be challenged directly, indirectly, or even implicitly by PQF. In each such case, the entire Finding of Fact is reproduced in Appendix V of this Brief, together with record references to support each finding. Underwriters have shortened their counter-statement by deleting findings such as those relating to jurisdiction, etc. In such cases, they have included the title of the finding and indicated the deleted portion by asterisks.

B. Underwriters' Statement Is Based Entirely on the Court's Findings of Fact; as Follows:

"Findings of Fact

"I.

"Jurisdiction of This Court [R. 249]

* * *

"II.

"Identity of Parties and Amounts Involved

* * *

"* * * George Hull, William Peck and O. E. Royer, designated in No. 2543 as 'additional parties at the instance of the Court,' and in No. 2348 as 'additional plaintiffs,' are residents and citizens of the State of Washington and *each of them had acquired interests in 'Pacific Queen Fisheries'* from John Breskovich, one of the named plaintiffs, when he sold portions of his interest to them in 1951-53. (Exs. 369 ff.) [R. 250]

"III.

"Trial to the Court

"Trial was to the Court. A jury trial was tardily asked in No. 2543, but was held to have been waived because the demand was not timely. *No jury trial was demanded in No. 2348.* At plaintiffs' request the two cases were consolidated for trial. [R. 251]

"IV.

"Court's Oral Decision on Facts
incorporated by reference [R. 251]

* * *

"V.

"Description of Pacific Queen and her ownership

"A. The D/V Pacific Queen was built in 1943 for the United States Navy as a salvage vessel (ex USS Anchor, ARS-13). She was a vessel of composite construction having a wooden hull and structures with steel decks and deckhouse. She was 988 gross tons, 672 net tons, 173 feet length, 37 feet width, and 18.8 feet depth, propelled by 1600 HP twin-screw Diesel engines. For her Navy salvage operation, she had been outfitted with two 1500 gallon gasoline tanks. These were equipped with an aqua or hydraulic system which dispensed gasoline by injecting water through interior piping into the tanks. This forced the gasoline of lighter specific gravity to rise. It was then transferred through permanent piping to pumps and discharge valves located above deck. This was a very safe system, but in 1949, pursuant to Coast

Guard orders when the Pacific Queen was chartered to carry cargo to Hawaii, it was blanked off and disconnected, and the two gasoline tanks filled with water. (Pl. Ex. 30). [R. 252]

"B. The Pacific Queen had been bought as war surplus from the government in 1948 by an individual who resold her to Pacific Boatbuilding Company, a corporation then controlled by plaintiff John Breskovich. It, in turn, resold the vessel in 1949 to the named plaintiffs, or their predecessors in interest, and thereafter John Breskovich sold portions of his interest to George Hull, William Peck and O. E. Royer as described above.

"VI.

"Loss by *Gasoline* Explosion

"The Pacific Queen became a total constructive loss on September 17, 1957, because of a violent *gasoline* explosion. One of two crew members quartered aboard the vessel lost his life. The other escaped and was one of the principal witnesses at the subsequent Coast Guard hearing described below. [R. 253]

"VII.

"Coast Guard Investigations and Report [R. 253]

* * *

"* * * the Court finds that the substance of said Findings of Fact and Conclusions (of fact) of the Coast Guard (Ex. 30, 31, 32) are true and correct, and hereby incorporates them by reference and adopts them as its own.

"D. Supplemental thereto, this Court makes its additional Findings of Fact as set forth below.

"VIII.

"Plaintiffs Failed to Disclose to Underwriters their Subsequent Carriage of Bulk Gasoline

"A. Beginning in 1950, plaintiffs operated the Pacific Queen between Puget Sound and Bristol Bay, Alaska, as a refrigerated vessel to freeze and transport catches of salmon from Alaska to ports on Puget Sound, Washington.

Until 1951, regulations of the U .S. Fish and Wildlife Service prohibited the use of power-driven fishing boats in Bristol Bay. This was a fish conservation measure. The small fishing boats known as gill-net boats were moved only by sail and oars. In 1951, this regulation was relaxed and power boats up to 32 feet in length were permitted. Many such boats are now powered by gasoline; others are powered by diesel oil fuel. Gasoline is a far more hazardous commodity than diesel oil to use or to transport, especially unless it is stowed or dispensed from safe containers. Gasoline and diesel oil are obtainable in Alaska from various sources including tank vessels, scows, barges and shore facilities. [R. 255]

"B. In 1951, the very safe Navy aqua system of transporting and dispensing gasoline above deck from the 2 gas tanks of the Pacific Queen was modified by adapting a portion of its interior piping into a pumping system creating a vacuum method whereby gasoline was pumped through permanently enclosed internal steel pipes to fixed piping for discharge above deck. This was also a safe system to transport and discharge gasoline.

"C. During the years beginning 1950, plaintiffs insured the vessel with various insurance companies including some, but not all, of the respective defendants which insured the vessel in 1957.

"D. During the years between 1950 and 1957, plaintiffs placed this insurance through various marine insurance brokers whom they selected. Sometimes plaintiffs selected Hansen & Rowland as their marine insurance brokers. In other of these years, plaintiffs selected Robt. Fleming, or McGraw, Kittinger & Case, or various other marine insurance brokers through whom plaintiffs placed the insurance on the Pacific Queen.

"E. On various occasions between 1950 and 1957 before each year's fishing season began, plaintiffs, through these respective brokers, requested that the vessel be surveyed by the Board of Marine Underwriters of San Francisco, or by

United States Salvage Association.

"F. On other occasions between 1950 and 1957 plaintiffs, through their brokers, requested that the [R. 256] vessel be surveyed by other well recognized and competent marine surveyors; such as Alexander Gow, Inc. in 1950 (Ex. 348), or Captain Adrian Raynaud in 1953 (Ex. 363). Neither of these surveyors reported the existence of any gasoline or gasoline tank capacity aboard the Pacific Queen.

"G. About May 3, 1955, Hansen & Rowland, acting as brokers for plaintiffs, requested United States Salvage Association to make a condition survey of the Pacific Queen. The Association assigned this duty to one Edward Marquat, an experienced surveyor, since deceased. Plaintiffs volunteered that he was an 'exceptionally careful and meticulous' surveyor. His condition survey report comprises a 6-page single-space report. It is dated May 13, 1955. With respect to gasoline, his report read in full text:

" 'Fuel and Water Capacities:

Fuel	49,000	gallons
Water	14,000	"
Gas	3,000	"

'(Gasoline tanks under deck aft, proper filling lines and vents to atmosphere).'

"H. The partnership of Pacific Queen Fisheries knew that this was the only information that any of the Underwriters had because, in 1956, one of the active partners of Pacific Queen Fisheries, John Vilicich, asked for and received from Hansen & Rowland a copy of the above 1955 Marquat report. [R. 257] Vilicich was experienced in the marine insurance business, since he was also d/b/a Commercial Marine Agency, and he was familiar with such surveys.

"I. The Pacific Queen did not engage in Alaska operations in 1956, but remained in lay-up status.

"J. About May 2, 1957, Hansen & Rowland, again acting as brokers for plaintiffs, requested United States Salvage Association to make a condition survey. This time they

particularly requested a survey of two newly purchased gillnet boats, and incidentally of the Pacific Queen (Lees' Dep. Ex. 405, p. 25; Elkins' Dep. Ex. 399, p. 31-2, 57-8; Broz Dep. Ex. 394, p. 20). This time the surveyor was J. E. Elkins, also a very experienced surveyor. His only prior survey of this vessel had been made in 1949 at which time no gasoline was being carried by the vessel. Elkins made his 1957 survey on May 2, 1957. Elkins' 1957 survey, like Gow's 1950 survey and Raynaud's 1953 survey, made no reference whatsoever to gasoline tank capacity, or to any bulk gasoline carried aboard the vessel. He reported the vessel was a mothership for gas-powered gillnet boats, but as stated above, bulk gasoline is obtainable from various sources in Alaska. Copies of Elkins' 1957 survey reports were furnished to plaintiffs' brokers, Hansen & Rowland, who, through its Mr. Duren, called on defendants on May 14 or 15, 1957, at San Francisco to place the insurance. He does not recall whether he took the 1957 survey with him but does recall seeing that the survey said nothing about gasoline. At that time he had [R. 258] not been told by the owners, and did not know about any increase in gasoline capacity, or of any changes in gasoline discharge methods, nor did he advise defendant insurers of these facts.

"IX.

"Plaintiffs' Changes in Bulk Gasoline Conditions Aboard the Pacific Queen were Material Increases in the Risk

"A. At the time of the explosion on September 17, 1957, the gasoline tank capacity had been increased from 3,000 to 8,000 gallons. Plaintiffs now contend that, sometime before the Marquat survey of May, 1955, the gasoline tank capacity of the Pacific Queen was increased to 8,000 gallons by filling 2 tanks, theretofore used for diesel fuel, with 5,000 gallons of gasoline; and that certain hazardous alterations, for discharging this gasoline as described below, had already been accomplished.

"B. *But any evidence of this is incredible.* As recently as

June, 1960, at a pre-trial deposition, plaintiffs' counsel stipulated that any such alterations in gas tank facilities were made some time after the end of the 1955 season and before the beginning of the 1957 season. (Breskovich Dep. Ex. 393, p. 87). The 1957 season did not begin until May 24, 1957, when 8,000 gallons of gasoline were loaded aboard before the Pacific Queen sailed to Alaska. *In other respects plaintiffs' evidence on this matter was conflicting and obscure. It is impossible to fix the exact date of these changes* [R. 259] *because the owners failed to come forward with any information until very late, and the information then offered was exceedingly vague and unsatisfactory.*

"C. *Based upon all of the evidence, the Court finds that, at some date subsequent to the 1955 survey, and prior to the attachment date of the insurances on May 24, 1957, the plaintiff owners and managers of the vessel had increased the gasoline-carrying capacity of the Pacific Queen from approximately 3,000 gallons to 8,000 gallons.* This alone was a material increase in the risk *which was not disclosed to the Underwriters.*

"D. An even greater *undisclosed* increase in the risk was accomplished at that same time by making the following extremely hazardous alterations in the method of discharging gasoline. Plaintiffs inserted interior below-deck exposed gasoline-discharge valves into fittings that had been designed and used for insertion of permanently secured drainage plugs. These valve replacements were located in or near a passageway where ship's equipment, fishing gear and personnel frequently passed.

"D[1][1] The increase in the risk in both particulars is an obvious fact that should have been known to anyone with a minimum of experience or understanding. It was certainly known to the owners of the Pacific Queen, and was virtually admitted by them. The installation of interior below-deck discharge of gasoline through the type of facilities that were provided on the Pacific Queen is so pat-[R. 260]ently an

[1] "D" repeated in original. Marked "D-1" herein to distinguish it.

increase in hazard as hardly to require expert testimony. It is impossible to defend as safe or proper such a system of discharge with hand valves located on or near a passageway where ship's equipment, fishing gear and personnel frequently pass back and forth.

"E. This altered method adapted by the Pacific Queen for the handling of gasoline was not in common usage, but was exclusive to the Pacific Queen. It was not used even on other vessels in which some of the owners of the Pacific Queen had, and have, an interest. (Mardesich dep. Ex. 406, pp. 8-10).

"X.

"Plaintiffs failed to Disclose these Material Increases in the Risk to Hansen & Rowland or to Defendants

"A. Plaintiff August Mardesich *was the Manager* of the Pacific Queen in 1957. He was not quartered or employed aboard the vessel in any capacity. He had personal knowledge of the gasoline tank and discharge changes which rendered the vessel extremely hazardous and which materially increased the risk. Neither he nor any of the other partners disclosed these changed conditions to the Underwriters.

"B. *The increased gasoline capacity and the hazardous modifications of the discharge system were not made at a time or under circumstances such as to bring them to either the actual or the constructive notice of the Underwriters.* [R. 261]

"C. The owners and managers of the Pacific Queen knew of these changes and did not disclose the increased gasoline capacity, or the altered and hazardous gasoline-discharge methods, to the defendant underwriters or to Hansen & Rowland, who were brokers for the owners, or to the surveyors.

"D. Neither Marquat, now deceased, who made an insurance survey in 1955, nor Elkins, since retired, who made the survey in 1957, knew of the increased gasoline capacity or of the unsafe and improper gasoline-discharge facilities at the time of their respective surveys, *and there was nothing*

observable by any reasonable inspection which would have disclosed the changes.

"E. At the time of the surveys by Marquat *and Elkins* there was nothing in the situation that was observable, by reasonable inspection, which would have disclosed that the owners and managers had made or intended to make the changes in gasoline capacity or discharge faciltiies which existed at the time of the loss of the Pacific Queen. Plaintiffs' counsel now claims, on brief, that, whenever these changes were made, they were 'a simple job that would not take two men 30 minutes.' (Pl. Memo on law issues filed pursuant to Court's Oral Decision, Doc. 136, p. 8, line 11).

"F. Both of the surveyors are described by everyone who has spoken to them as having been marine surveyors of the highest ability, character and integrity, who would not have overlooked or dis-[R. 262]regarded anything of the magnitude of the increase in the risk here described if it had been actually conveyed to them. Marquat was particularly meticulous in the survey work that he did. It is inconceivable, and there is no credible evidence to the contrary, that he had, either by any oral statement made to him or by anything that could or should have been seen in making his survey, any knowledge which would have disclosed either the increased gasoline capacity or the change in discharge facilities that existed at the time of the loss.

"G. At the time of the 1957 survey Elkins was asked primarily to survey the new gillnetters, and incidentally 'to take a quick look at the Queen.' No representative of plaintiffs identified himself when Elkins surveyed the Pacific Queen, though Jasprica was present and failed to do so.

"H. Had either of the surveyors, Marquat or Elkins, actually known of the increased gasoline capacity or of the unsafe and improper gasoline-discharge facilities at the time of their respective surveys, they would not only have reported the same in their surveys but would have required correction of the facilities prior to the issuance of insurance.

"I. This loading of gasoline on board and the altered dis-

charge methods were done with the knowledge of plaintiffs' manager and owner, August Mardesich, and of the other partners, including [R. 263] Mr. Barovic, Mr. Breskovich and Mr. Jasprica. The latter occupied several roles as part-owner, chief-engineer and fishing-superintendent.

"J. Each of the changes constituted a material increase in the risk *which was concealed from and not disclosed to defendants.*

"K. The material increases in the risk arose when the altered gasoline-discharge facilities were installed and gasoline-carrying capacity more than doubled, and such greatly increased quantities loaded on board under such hazardous conditions. At that time, the owners either knew or, in the exercise of the most minimal standards of prudence and care, should have known of the increase in risk by reason both of the increase in carrying capacity of gasoline and, even more emphatically, by reason of the changed gasoline discharge methods to an extremely hazardous below-deck system.

"L. Defendants would not have insured the vessel if plaintiffs or their brokers had disclosed to them any or all of these material increases in the risks.

"XI.

"The Pacific Queen was repeatedly sent to Sea in an Unseaworthy State with the Privity of the Owners

"A. *The Pacific Queen was unseaworthy each time she was sent to sea on and after May 24, 1957.* The Pacific Queen was unseaworthy when she left for her 1957 voyage by reason of the hazardous con-[R. 264]dition caused by the increased gasoline-carrying capacity and, to an even greater extent, by reason of the changed method of piping, valving and internal methods of discharge of gasoline. This system was grossly unsafe and improper, and created a great and serious hazard to life and property. The owners were privy to this unseaworthiness, and knew of these conditions and

neglected to take reasonable precaution to correct these deficiencies and to make her seaworthy.

"B. After the Pacific Queen returned from Alaska, she shifted to various Puget Sound docks and was then sent *to sea* from Seattle to Friday Harbor, Washington. The hazardous gasoline condition remained uncorrected, and she was still in an unseaworthy state with privity and knowledge of her owners, and of her manager.

"C. While she was at Friday Harbor, she still had on board some remaining 2,000 gallons of gasoline. (USCG Report, Ex. 30, p. 4). On September 9, 1957, at Friday Harbor, from 500 to 600 gallons of gasoline were spilled from one of the four tanks in the hold of the Pacific Queen into the interior of the vessel. Although now minimized and treated as trivial by plaintiffs, this was a catastrophe of major proportions. It created great hazards to the ship, life and property, both then and later. Gasoline from the spill soaked and impregnated large parts of the wooden hull and structure of the vessel. It was not a sudden spill but began early in the evening preceding its discovery at 4 a.m. by the [R. 265] cook. In the course of the spill, liquid gasoline and gasoline fumes permeated the lower after portion of the vessel. The spill was reported to one of the plaintiff owners and the manager of the vessel, August Mardesich, while he was in Friday Harbor on September 9, 1957. He inspected the vessel, but did not give any specific orders as to the methods to be used in cleaning up the vessel, did not order any chemical tests to be made as to whether she was gas-free, and did not order any plugging-up of the valves on the other gasoline tanks to prevent further similar spills; nor did he order the discharge of the remaining gasoline from the other tanks. The methods that were taken to purge the vessel of the gasoline were not adequate and did not constitute the exercise of due diligence considering the serious nature of the spill. On this question the testimony of Mr. Kniseley and Mr. Spaulding, both men of extensive practical experience in this field as well as possessed of great theoretical knowledge, is unquestionably correct that the meas-

ures taken to clean up the spill were inadequate. In addition to Mr. Mardesich, Mr. Jasprica, also an owner of the Pacific Queen, was present at the time of the spill and participated in the inadequate clean-up measures. The vessel was unseaworthy after the Friday Harbor spill for want of full and proper precautions to clean and purge the ship after the spill. She was also unseaworthy because of the continuing hazard of her altered method of [R. 266] gasoline discharge, and the absence of precaution to prevent further spills resulting in extremely hazardous below-deck carriage of bulk gasoline. A plug was put into the valve on one of the tanks but no precautions were taken to prevent similar spills from the remaining three tanks. All of the plaintiffs' witnesses, including two of the part-owners, who were experienced in the handling of gasoline, agreed that this was a serious want of due diligence. All of defendants' witnesses agreed that it was extraordinarily hazardous to permit a vessel to be in such condition, or to send the vessel to sea in such condition, and that it might take a period of weeks before the vessel was sufficiently gas-free to operate with safety.

"D. It is interesting to note that the Friday Harbor spill was first discovered at 4 o'clock in the morning by the cook who was sleeping in his quarters on the main deck to which the fumes were wafted while the vessel was in a dead state with its ventilation not operating. It is probably more than coincidental that 8 days later, in Tacoma, at exactly the same time under almost identical conditions, the next time the ship's ventilation was shut down, the explosion took place in an area between the place of the spill and the location of the crews' quarters.

"E. The vessel was sent *to sea with the privity of the owners and managers* in an unseaworthy condition from Friday Harbor to Seattle where she [R. 267] remained a few days exposed to the same hazards and tied up at an oil dock where great hazard to life and property was continuously threatened. She then was again sent to sea from Seattle to Tacoma under the same extremely hazardous conditions.

"F. By reason of the continuing hazardous and unsafe method of discharging gasoline and by reason of the failure properly to clean up after the Friday Harbor spill, the Pacific Queen was again sent *to sea* in an unseaworthy condition when she left Seattle for Tacoma two days prior to her explosion and loss.

"G. The day after her arrival at Tacoma, while still in such perilous and unseaworthy condition *with the privity and knowledge of her assured owners and managers,* she exploded and became a constructive total loss with loss of life, and destruction of property. Her continuous unseaworthiness until her fatal explosion was a proximate cause of her loss.

"XII.

"The Destruction of the Pacific Queen was Caused by a *Gasoline* Explosion

"A. *Based on the overwhelming preponderance of the evidence,* the constructive total loss of the Pacific Queen was the result of a *gasoline* explosion. *There is no credible or reasonable direct evidence or inference from the evidence to the contrary. The explosion was of gasoline and gasoline vapors from* [R. 268] *the prior spill into the interior of the vessel at Friday Harbor. The fire which followed the destructive explosion was primarily of this gasoline and gasoline vapors feeding on the wooden members of the then shattered hulk of the Pacific Queen as she was sinking to the shallow bottom. But the explosion had already caused such extensive wreckage as to render her a constructive total loss irrespective of the subsequent gasoline flames touched off by the explosion which engulfed the wrecked vessel and though intense were soon extinguished.*

"B. *There is no credible evidence of arson. The Tacoma Fire Department, the Tacoma Police Department,* and the United States Coast Guard *all* made extensive investigations and none found any basis for such a conclusion. *No further evidence whatsoever as to arson or other wrongful acts by third persons was adduced in the extensive pre-trial*

depositions, or at trial; and the Court finds there is no basis in fact for any such contentions. The explosion was due to accumulated gas vapors that created a most perilous condition, and to accidental ignition possibly by the deceased crew member or some other chance spark.

"C. *There was no pre-existing fire in the Pacific Queen preceding the explosion. The gasoline explosion was the proximate cause of the constructive total loss of the vessel. The source of ignition is unknown. It could have been a spark from a cigarette, or a match, or an electric contact, or other* [R. 269] *accidental source; but the explosion resulted from a want of due diligence by the assured owners and manager to remedy the extremely hazardous conditions which existed from the time of the gasoline spill.*

"D. *The possibility that it was an ammonia explosion is, at the very best, not any more than remote and unlikely speculation.* Captain Buckler's testimony to the effect that he now believes the explosion to have been of ammonia origin was arrived at shortly before trial in conference with plaintiffs' counsel, and without his being in possession of any additional facts other than those on which, a few months earlier, he had based his prior written survey opinion that the cause of the explosion was unknown. Plaintiffs' expert witness, Mr. Sax, based his opinion that the explosion was of ammonia origin on an inadequate examination of the vessel and on assumed facts which were not supported by the evidence.

"E. Testimony, introduced by the plaintiffs, of witnesses living within a few hundred feet of the explosion, who were immediately awakened and could observe its inception, reported a ball of orange fire and of black smoke at the time of the explosion. Such a characteristic is consistent only with an explosion of gasoline vapor origin. It is not consistent with one of ammonia origin. Plaintiffs' expert, Mr. Sax, also concedes this fact. *The ammonia odor at the scene of the catastrophe was* [R. 270] *from ammonia remnants in a refrigeration system that had previously been completely*

pumped down. The odor is very noxious and can arise from small traces or quantities.

"F. Moreover, and more importantly, the theory of an ammonia explosion is based entirely upon the additional hypothesis that a severe fire existed in the engine room prior to the explosion. *The Court's personal examination aboard the hulk of the Pacific Queen and the photographs in evidence show, beyond the slightest question, that no fire existed in the engine room prior to the time that the forward bulkhead in the engine room was blown off its flanges. This occurred at the time of the explosion. The char in the engine room and behind the flanges is easily explicable by the fury of the fire after the explosion. This is illustrated by the photographs taken by Mr. Kollar.*

"G. The Court was much more favorably impressed by the testimony of defendants' witnesses, Professor Moulton, Mr. Kniseley and Captain Lees, not only by reason of their greater scientific qualifications and practical experience and ability in the areas as to which they testified, but also because they were much more adequately apprised of the true facts of the explosion and fire.

"H. *The peculiar internal system of ventilation and the path of air on the Pacific Queen, unaided by mechanical ventilation, so graphically illustrated at the time of the Friday Harbor spill, resulted* [R. 271] *in the presence in the upper port forward engine room of an explosive mixture of gasoline vapors with air at the time of the explosion which mixture was the explosive agent and cause of the loss of the Pacific Queen.*

"XIII.

"The Owners and Manager of the Pacific Queen Did Not Use Due Diligence to Prevent the Loss of the Pacific Queen by Explosion.

"A. Some of the owners and the manager of the Pacific Queen, Mardesich, were privy to, and had thorough knowledge of the dangerous conditions aboard the Pacific Queen

from the time 8,000 gallons of gasoline were loaded in May 1957, to the date of the explosion on September 17, 1957. The owners and the manager, Mardesich, failed to use due diligence and were grossly negligent in preventing the loss of the Pacific Queen by explosion in at least two respects:

"1. First, as outlined above, at some time between 1955 and May 24, 1957, they were privy to and knew they had converted the gasoline discharge facilities of the Pacific Queen in such fashion as they became totally improper and unsafe. This improper and unsafe system was a proximate cause of the explosion and resultant destruction of the vessel.

"2. Second, the owners and manager of the Pacific Queen *were privy to the Friday Harbor spill and failed to use due diligence and were grossly* [R. 272] *negligent* in the steps taken towards cleaning up the results of the Friday Harbor gasoline spill and to purge the vessel and its structures of gasoline and gasoline vapors, all with the actual knowledge and acquiescence and direction of owner *and manager Mardesich, as well as of owner,* superintendent and chief engineer Jasprica.

"B. *The manager,* Mr. Mardesich, *was especially privy to all of these conditions.* He knew of the alterations of the tanks; of the loading of 8,000 gallons of gasoline; of the extreme hazard of exposed interior valves; and of the serious gasoline spill at Friday Harbor; and he personally inspected the vessel at that time, *but he failed to exercise due diligence to purge her of gasoline and fumes,* or to remove the remaining bulk gasoline, or to make any gas-free tests, or to secure and plug the drain-valves in the other tanks. Considering the serious nature of the spill, the measures taken by the owners and manager to purge the Pacific Queen of gasoline and gasoline vapors were not adequate in the exercise of due diligence.

"C. *The subsequent explosion and destruction of the Pacific Queen were proximately caused by these failures by*

the owner or manager to use due diligence. This failure to use due diligence was with the privity and knowledge of the owners, and of the manager, Mardesich. He was fully informed but treated the hazardous loading, stowage, and subse-[R. 273]quent large spill of gasoline with such a casual indifference *as to amount to gross negligence and an extraordinary want of due diligence.*

"XIV.

"Plaintiffs had Imputed Knowledge of the Tanker Act and of Coast Guard Regulations which made it Unlawful to Transport Bulk Gasoline without a Certificate

"A. In 1949 plaintiff John Breskovich, as one of the owners of the Pacific Queen, chartered her to sail to the Hawaiian Islands, carrying refrigerated cargo during the time of a maritime strike. Incident to such use, he was required to have the vessel inspected by Coast Guard inspection, which required the vessel to make certain changes before she sailed, including the following:

> '2-2000-gal. gasoline tanks aft of compressor room to be pumped dry of gasoline, lines disconnect(ed) & tanks filled with water & plugged.' (Emphasis supplied in original.)

"B. Plaintiff John Breskovich had actual knowledge of the existence of the Tanker Act by reason of his compliance with the Coast Guard regulations thereunder in preparing the Pacific Queen for a cargo voyage to Hawaii in 1949.

"C. Plaintiff John Vilicich had actual knowledge of the Coast Guard's contention that the Tanker Act was applicable to the Pacific Queen and reefer fishing vessels by August 1957 because the Alaska Reefer, another vessel of which he was also a part-owner, was cited for a violation of the Tanker[R. 274]Act by the Coast Guard for transporting bulk gasoline without inspection and certification as to safety. He knew this at least three weeks before the Friday Harbor spill.

"D. Plaintiff August P. Mardesich is a graduate of the University of Washington Law School, a member of the Washington State Bar Association and majority leader of the legislature. He also knew of that claim of the Coast Guard prior to the time the Pacific Queen was sent to sea to Friday Harbor because he was told in August, 1957, by Steve Vilicich, the brother of John Vilicich and another owner of the Alaska Reefer, of the citation of that vessel for a violation of the Tanker Act. This was three weeks before the Friday Harbor spill.

"E. Each of the three managing owners of the Pacific Queen, in its earlier years, were men of wide business experience and standing in the community. Each knew of the Tanker Act.

"XV.

"The Pacific Queen was in Continuing Violation of the Tanker Act Through the Fishing Season of 1957

"A. *In 1957 gasoline was carried as cargo.* It was sold to some independent fishermen. It was one of the concessions given to other independent fishermen to get them to fish for the Pacific Queen. More than 4% of the 8,000 gallons of gasoline carried to Alaska[R. 275]was sold to independent fishermen Pearson and Vistad. This amount constituted more than 6% of the number of gallons of gasoline actually used in the 1957 fishing season by the Pacific Queen.

"B. Under the 1957 joint venture agreement between Pacific Queen Fisheries, Pacific Reefer Fisheries, and North Star Fisheries, only 8 of 20 gillnet boats carried aboard the Pacific Queen belonged to Pacific Queen Fisheries. Nine belonged to Pacific Reefer Fisheries, one to North Star Fisheries, and two were independents. Under the terms of the joint venture agreement, the Pacific Queen agreed to supply gasoline for all of these other gillnet boats except the independents to whom it sold gasoline. Thus, well over 50% of the gasoline carried aboard the Pacific Queen was intended

for gillnet fishing vessels, other than those belonging to the Pacific Queen.

"XVI.

"Insurance and Premiums

* * * [R. 276]

"XVII.

"Determination of English law and usage

* * *

"XVIII.

"A gasoline explosion by accidental source was reasonably foreseeable

"A gasoline explosion such as that which happened was reasonably foreseeable in the exercise of due [R. 277] *diligence by the owners and managers of the Pacific Queen. The vessel permeated with gasoline fumes was a 'floating time bomb' which would explode by a spark from any source.* She lay at a public dock frequented by ships' personnel, fishermen, sightseers, and visitors. In the summertime, is 'loaded' with people 'who go for recreation' and 'plenty of lovers sometimes go to park.' (Ex. 233, Nevens, pp. 12-13). With knowledge that this vessel was *permeated with gasoline fumes,* and in a frequented public place, the owners and manager took no steps to provide a watchman or warn crew members not to smoke or light matches, etc. *The explosion was reasonably foreseeable in the exercise of ordinary care or reasonable diligence.*

"XIX.

"Effect, if Coast Guard Inspection had been made

"If the vessel had been inspected by the Coast Guard, the gasoline discharge facilities below deck would not have been approved. (Opinion, Doc. 132, p. 21).

"XX.

"Intermediate Facts Incorporated by Reference

"In arriving at the foregoing Findings of Fact, this Court has considered all of the various matters of proof presented. Those not specifically mentioned in the Findings

have been deemed intermediate in the process of ascertaining the ultimate facts. [R.278].

* * *

"Done in Open Court this 23rd day of March, 1961.

/s/ GEO. H. BOLDT
United States District Judge.

"[Endorsed]: Filed March 23, 1961." [R. 287]

C. The Court's Findings Are in Sharp Contrast to PQF's Statement of the Facts.

For space limitations, Underwriters will here point out only three out of many examples of errors and omissions in PQF's Statement of Facts. After admitting that appellant August Mardesich was manager of the Pacific Queen in 1957, PQF's statement goes on to add that:

> "His managerial role in connection with the PACIFIC QUEEN was primarily in the realm of finance and banking." (PQF Br. 7).

It is true that Mr. Mardesich did, at one point, make such an exculpatory remark (R. 325, 337). Elsewhere Mr. Mardesich admitted to being in full charge of all of the operations of the PACIFIC QUEEN, including the determination to increase its gasoline-carrying capacity (R. 994). He admitted:

> "I ordinarily make all kinds of arrangements before the ship leaves. I would be supplying, fueling, and in a general way I don't take care of those things myself, but I make sure they are done; hiring of fishermen, making arrangements for the purchase of nets, all those things that go into the operation." (R. 983).

Breskovich, Hull and Jasprica all made the same point. (R. 1314, 1334, 1501, 1582-1583). Jasprica summarized it by saying:

> "* * * Augie (Mardesich) * * * told the skipper how far he is supposed to go. I can't go over Augie, you know. *Augie is the boss.*" (R. 1596; emphasis added.)

Even more misleading is PQF's statement, for which it also cites the Coast Guard Report, that:

> "Pacific Queen was also equipped to carry, in four steel tanks located below deck in the after end of the vessel, gasoline to be utilized by her gillnetters during fishing operations." (PQF Br. 4).

In fact, the cited portion of the Coast Guard Report actually states that:

> "Construction of the vessel's four bulk gasoline tanks and their operational use *on the last voyage* (*1957*) is described as follows: * * * (R. 1058; emphasis added).

Still more misleading is PQF's statement interwoven into its argument, and for which it cites the Findings of Fact, that:

> "The lower court concedes 'there was ammonia odor at the scene of the catastrophe'." (R. 270) (PQF Op. Br. 18)

and then quotes the Coast Guard report and argues that ammonia was present in a "goodly quantity." (PQF Op. Br. 19) We do not quarrel with the right to argue any plausible theory, but if Findings are quoted they should be fairly stated. What the Court said at the cited page follows:

> "The ammonia odor at the scene of the catastrophe was from ammonia remnants in a refrigeration system that had previously been completely pumped down. (cf. R. 591-4). The odor is very noxious and can arise from small traces or quantities." (R. 270-271)

Record support for each of the possibly challenged Findings as italicized above is shown in Appendix V.

D. All of the Court's Findings Are Supported by Substantial Evidence and None Is "Clearly Erroneous".

Underwriters are similarly prepared to document all of the other findings with record references which show that none of the findings are "clearly erroneous" (F. R. Civ. P. Rule 52 (a)), but, on the contrary each is supported by substantial evidence.

IV. QUESTIONS PRESENTED

A. Should the appeal be dismissed by reason of PQF's flagrant violation of Rules 17 and 18 of this Court in:

1. Failing to designate more than a fragment of the material evidence;

2. Failing to specify alleged errors with particularity;

3. Combining numerous alleged errors into single statements of alleged error;

4. Failing to prepare a table of exhibits?

B. Is PQF bound by its Stipulation that English Law and Usage shall govern?

C. Should the judgment be affirmed on the merits by reason of an affirmative answer to any one of the following questions, all of which were answered in the affirmative by the Trial Court?

1. Was the alleged insurance void *ab initio* under Sections 17 to 20 of the Marine Insurance Act, 1906, because PQF's owners, managers and brokers failed to disclose to and concealed from the Underwriters, before the insurance was issued, material increases in the risk relating to the stowage, carriage, dispensation, and use of bulk gasoline by the Pacific Queen, thus causing the Underwriters to issue hull insurance

which they would not have issued if the true facts had been disclosed? (Concl. IV, R. 280).

2. Was the PACIFIC QUEEN repeatedly sent to sea in an unseaworthy state with the privity of the insured, in violation of § 39(5) of the Marine Insurance Act, 1906; originally by reason of its unique and undisclosed extraordinarily hazardous methods of stowage, carriage, dispensation and use of bulk gasoline; and, in addition, after a spillage of some 600 gallons of bulk gasoline into the interior of the vessel, for want of due diligence in cleaning and purging the vessel, and in permitting quantities to remain in the tanks exposed to danger of further spills? (Concl. V, R. 281).

3. Was the constructive total loss of the PACIFIC QUEEN by a gasoline explosion specifically exempted from insurance coverage under the terms of the Inchmaree clause by reason of the fact that it resulted from want of due diligence by the owners and managers of the vessel? (Concl. VI, R. 282).

4. Did PQF violate the implied warranty of § 41 of the Marine Insurance Act, 1906, that the adventure is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner, by causing the PACIFIC QUEEN to transport bulk gasoline as cargo in violation of the Tanker Act, 46 USC § 391a? (Concl. VII, R. 284).

   (a) Was the unlawful failure of PQF to secure inspection by the United States Coast Guard of the gasoline facilities of the PACIFIC QUEEN, and their failure to correct these facilities in a manner which the Coast Guard would have required upon inspection, a concurrent proximate cause of her constructive total loss; and, if so, was this violation of law an additional element of want of due diligence by her owners and manager that excludes liability under the Inchmaree clause, and of unseaworthiness with privity of the owners in vio-

lation of § 39(5) of the Marine Insurance Act, 1906; and if so, did each of these failures to exercise due diligence also proximately contribute to the explosion and constructive total loss of the PACIFIC QUEEN? (Concl. VII, IX, R. 284-285).

D. Did the Trial Court properly decide the three following collateral questions?

1. Did the trial court properly conclude that the "additional parties" named at the instance of the court, Messrs. Hull, Peck and Royer, were partners in PQF, and that any admissions by them constituted admissions against the interests of the partnership? (Concl. X, R. 285-286).

2. Did the trial court properly conclude that PQF delayed so long in bringing suit in No. 2543 against defendant Buffalo Insurance Company as to effect a time bar within the meaning of its policy? (Concl. XI, R. 287).

3. Did PQF's oral motion in No. 2543 to consolidate No. 2348, then pending as a State Court case after earlier remand, for trial with No. 2543, which had already been assigned for trial, create any rights to jury trial of No. 2348, where PQF had admittedly waived such right in No. 2543 and did not perfect such a right in No. 2348 in the State Court; and where PQF made no motion or intimation to the Federal Court concerning jury trial of No. 2348 when it orally moved to consolidate it with No. 2543, or when PQF was requested by the Federal Court Clerk to physically remove the files in No. 2348 from the State Court for filing in the Federal Court, or prior to commencement of a non-jury trial of both cases on such consolidated record, or during said non-jury trial, or by motion for a new trial after the Court had rendered its opinion in favor of Underwriters, or in settling the Court's proposed Findings, Conclusions, and Judgment; or in its Statement of Points on appeal to this Court; or at any other time until filing its Opening Brief herein?

V. CONCISE SUMMARY OF ARGUMENT

A. The judgment should be affirmed or the appeal dismissed because of serious violation of this Court's rules, as enumerated in Questions Presented and briefed in the following section.

B. English Law and Usage is applicable and supports the judgment on the merits (Concl. III, R. 279).

C. There are four independent and separate grounds for affirming the Trial Court's Findings, Conclusions and Judgment:

1. The policies were void *ab initio* and did not attach because of non-disclosure or concealment (Concl. IV, R. 280).

2. Even if the insurance attached, the insurance is void because the PACIFIC QUEEN was sent to sea in an unseaworthy state, with the privity of the owners and managers, in violation of the Marine Insurance Act, 1906, § 39(5). (Concl. V, R. 281-2).

3. Even if the insurance attached, the loss of the PACIFIC QUEEN by explosion is not an agreed peril under the Inchmaree clause because the loss resulted from "want of due diligence by the owners of the vessel, or any of them, or by the managers." (Concl. VI, R. 82, 282).

4. Even if the insurance attached, it was void because the PACIFIC QUEEN transported bulk gasoline in violation of the Tanker Act, 46 USC § 391a.[1] This was a separate and additional violation of the statutory warranty of seaworthiness under § 39(5) of the Marine Insurance Act; and was also an independent "want of due diligence" by the owners and managers under the Inchmaree clause.

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[1] Reproduced in full text in Appendix II.

D. Three subsidiary conclusions of the trial court should be affirmed:

1. Hull, Peck and Royer were partners of PQF and their admissions of want of due diligence in sending the PACIFIC QUEEN to sea in an unseaworthy state, and that bulk gasoline aboard the PACIFIC QUEEN was sold and bartered, and were not her "fuel or stores," are binding on PQF.

2. Suit against Buffalo Insurance Company is time barred.

3. Two cases were submitted by both parties for non-jury trial. There is no merit to PQF's contention now raised for the first time that some new right to jury trial arose by voluntarily requesting that their pending State Court case be tried and determined with the Federal Court case already set for trial. In any event, this new contention was never raised, presented to or passed upon by the Trial Court, or by PQF's Statement of Points, on appeal to this Court, or at any time until PQF's Opening Brief, and therefore was not preserved for appeal and should not now be considered by this Court.

VI. ARGUMENT

A. The Judgment of the District Court Must Be Affirmed, or the Appeals Dismissed, Because of PQF's Serious Violations of Rules 17 and 18 of this Court.

1. PQF's Designation of the Record violates this Court's Rule 17, subd. 6, that appellants shall designate:

> " * * * all of the record which is material to the consideration of the appeal * * *."

An inspection of PQF's Designation of the Record[1] shows that PQF designated for printing only fragments of favor-

[1] PQF adopted as its Designation of the Record here, the one which it had filed in the District Court (Original Paper No. 47, R. 318). PQF did not designate this for printing, but it is in this Court's file. See PQF's letter to the Clerk of this Court dated November 10, 1961.

able evidence on disputed issues, and omitted most of the adverse evidence whether adduced on direct or on cross.

For example, PQF's first witness, Mardesich, their managing partner, testified extensively (R. 325-345, 974-1014). One disputed issue is the status of Hull, Peck and Royer as PQF partners (Finding, R. 250; Concl., R. 285; PQF Op. Br. 48-50). Mardesich testified on this issue and he identified federal Income Tax Returns signed by him which reported them as partners (*e.g.* R. 326, 331, 333, *passim* through 345); but PQF designated none of this record. In fact PQF designated from Mardesich's first 20 pages of testimony only the first 8 lines of his direct exaimnation (R. 235) and 4 lines of cross (R. 337). These excerpts deal only with his alleged activities in the "realm of finance and banking," cited above, as illustrative of PQF's misleading "statements" of fact.

Each succeeding designation by PQF is equally a patchwork of favorable snatches of evidence. This is particularly flagrant as to non-disclosure, unseaworthiness, gasoline as the cause of the explosion, and want of due diligence. Compare Appendix V, *infra,* with PQF's Designation of Record for Printing. Such picking and choosing of bits of testimony does not comport with either the spirit or letter of Rule 17, subd. 6. This Court, in *Watson v. Button,* 235 F.(2d) 235, at 238 (CA 9, 1956), recently reaffirmed that:

> "The burden is on (appellant) to show that the trial court's finding was clearly erroneous. An *appellant must include* in the record *all of the evidence* on which the District Court might have based its findings. (Note re F. R. Civ. P. 75 e.) When this is not done, the judgment of the District Court must be affirmed. (Citing cases)"

True, the Underwriter appellees sought to correct the

record by designating at least sufficient portions to illuminate the other side of the coin.[1] But theirs is not the burden. Moreover, if appellants elect to flaunt the rule, appellees are constrained to designate sufficient evidence to show the Findings are not "clearly erroneous," yet, if appellants abandon all fact issues, appellees must keep the record adequately abbreviated under F. R. Civ. P. 75(e). Here Underwriters have by no means designated all the supporting evidence; and they were additionally handicapped because PQF's Specification of Errors fails to identify challenged findings, *infra,* p. 32.

In *Watson, supra,* 235 F.(2d) at 238, note 8, this Court cited with approval *In re Chapman Coal Co.,* 196 F.(2d) 779, 785 (CA 7, 1952). There the Court said:

> "Where, as in this case, there has been a hearing in the District Court in which the parties have participated by their attorneys, where evidence has been heard, and where the District Court has entered an order which would be justified by evidence which might have been induced or agreements which might have been made between the parties in such hearing, the burden is upon the party appealing from such an order to include in the record on appeal a proper transcript of the hearing to show that there was no such evidence or agreement. *All possible presumptions are indulged to sustain the action of the trial court.* It is, *therefore,* elementary that *an appellant seeking reversal* of an order entered by the trial court *must furnish* to the appellate court *a sufficient record* to positively show the alleged error. (Citing cases)
>
> "That was not done by the appellant here. It fol-

[1] Defendant appellees' Designation of Additional Portions of Content of Record for printing dated Nov. 24, 1961, and filed with the Clerk of this Court Nov. 25, 1961.

lows that each of the orders appealed from must be and is

"Affirmed."

It is respectfully submitted that on this ground alone the judgment of the District Court "must be affirmed."

2. Defendants' Opening Brief also violates seriously this Court's Rule 18 subd. 2 (d), which requires that:

> "*In all cases,* when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

It has repeatedly been held that this Rule must be observed.

> *Thys Co. v. Anglo California National Bank,* 219 F. (2d) 131, 132 (CA 9, 1955), and cases cited.

PQF's Specification of Errors reads in full text:

> "*Forty-eight alleged errors* on the part of the lower court *have been specified* in our Statement of Points found at Volume I, pp. 297a-297h of the Record. *Of these,* only Nos. 1, 3, 14 and 47 are no longer considered germane to this appeal, and *the rest are incorporated by reference* herein as if fully set forth. In the Argument following hereafter, *many of the specific errors will be consolidated* under certain main points of argument." (PQF Op. Br. p. 11)

Of PQF's 48 Points (R. 297a-h), PQF specifically identifies only one, No. 24 (R. 297(d)), (PQF Op. Br. p. 45).[1]

This clearly violates Rule 18.

The portion of PQF's Brief entitled "Argument" (pp. 16-70) is divided into ten sections. Sections IV and VI are

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[1] Underwriters, without prejudice to their contentions that the judgment must be affirmed, or the appeal dismissed, have met Point No. 24 in their following Answer on the merits. (Und. Br. p. —).

each divided into four sub-issues; Section V is divided into two sub-issues. No points, or errors, are specified.

Under the Rule and *Thys, supra,* 219 F.(2d) at 132, this Court has reiterated:

> "Specifications of error which set out more than one error are improper and need not be considered."

In *Everest & Jennings, Inc. v. E. & J. Manufacturing Co.,* 263 F.(2d) 254, 258, (CA 9, 1958, rehearing denied 1959) this Court held that, where appellants cited 26 Specifications of Error in their Statement of Points, but set out in argument only 8 errors, the Appellate Court was relieved of considering the omitted errors, even if they were set forth elsewhere in the record.

While PQF's Statement of Points claimed that nine Findings of Fact were erroneous (R. 297a-c, Nos. 4-13), their Brief (p. 17) "sets out" in argument but one, that:

> "The Court's finding that the destruction of the vessel was the result of a gasoline explosion is clearly erroneous."

And it does not even identify either by number or by record reference what Finding, or which of 48 points, is drawn in issue. All of PQF's remaining Brief purports to challenge unidentified "Conclusions," or "Failures to Conclude." Their argument on these alleged errors is couched in such broad terms that Underwriters can only speculate as to which specific Findings or Conclusions, or portions of the Court's oral opinions are challenged; or which of PQF's Points or Specifications of Error challenge the Findings. It is thus impossible for Underwriters to know "as particularly as may be" what is "alleged to be erroneous."

In *Thys, supra,* 219 F.(2d) at pp. 132-3, this Court held that:

> " * * * in disregard of the Rule, the particular points raised are not stated in full before being discussed, several allegedly erroneous findings of fact are joined under one heading for argument, and there is a failure to state with particularity wherein some of them are thought to be erroneous."

And in *Peck v. Shell Oil Co.,* 142 F.(2d) 141, 143 (CA 9, 1944) this Court held:

> "With respect to many of the 'points' * * * no argument or discussion is presented in their opening brief. Therefore these points are deemed abandoned and need not be considered here. (Citing cases)"

3. A further handicap to this Court's review, or to a concise Answering Brief, arises because PQF has not complied with this Court's Rule 18, subd. 2(f), which requires Appellants' Opening Brief to set out in an appendix "page references to the record where the exhibits were identified, offered and received or rejected as evidence."[1]

> *Brandow v. United States,* 268 F.(2d) 559, 566, (CA 9, 1959).

For example, PQF's brief, p. 14 quotes from an exhibit which under a different number, 440, was rejected as evidence on PQF's own objection. (See, typed transcript of original record, not printed, P. 1508.)

For these serious violations of this Court's Rules, which must seriously impede the Court in a clear understanding of alleged errors, and which have seriously handicapped Underwriters in preparing a comprehensive, yet concise, Answering Brief, it is respectfully submitted that the judgment below must be affirmed, or the appeal dismissed.

> Cf. *Morrison v. Texas Company,* 289 F.(2d) 382 (CA 7, 1961).

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[1] Appellees, to assist the Court, and without prejudice to their contention that the appeal should be dismissed or the judgment affirmed, have supplied the required Table of Exhibits as their Appendix VI.

B. English Law and Usage Governs Determination of the Legal Issues on These Marine Insurance Policies.

The Trial Court, after comprehensive briefing, repeatedly so held (R. 226, 277, 279-280). It should no longer be in doubt. PQF's "Statement of Points" Nos. 3 and 14 (R. 297a, c) had challenged this, but their "Specification of Errors" now abandons them (PQF's Op. Br. 11). Yet PQF's next following paragraph captioned "Statement Concerning the Law Applicable" appears to becloud their concession by quoting out of context restrictive language from an anonymous law review note and by misreading a District Court opinion (PQF Op. Br. 11-12).

At the outset it is essential to affirm the Trial Court's holding that English Law and Usage is applicable here, and not to hedge it.

The law review quotation is out of context because it refers to and cites life insurance cases rather than marine insurance precedents; and because it omits the following sentence from the same paragraph of the note from which PQF quotes (PQF Op. Br. 12).

> "*Express stipulations,* nevertheless, *are given effect,* except perhaps when contrary to an express provision of a statute of the insured's state." 62 *Harv. L. Rev.* at 651 (1949).

Here the Trial Court expressly found:

> "The parties having agreed thereto in the insurance contract, and there being no Washington law precluding such stipulation, the English law and usage provision is valid and controlling." (*Mem. Decision,* September 28, 1960, R. 226).

The proper rule on marine insurance policies in the State of Washington is well summarized in *2 Couch, Cyc. of Ins. Law,* § 16:21, p. 33 (2d ed., 1959) that:

> "A marine policy is to be construed according to English marine insurance laws and customs where the parties have so stipulated in the policy." (Citing *Lecicich v. North River Insurance Co.*, 191 Wash. 305, 71 P.2d 35 (1937)).

The excerpt from *Landry v. Steamship Mutual Underwriting Ass'n.*, 177 F.Supp. 142, at 146 (D. Mass., 1958), states:

> "*However, since there do not seem to be any English authorities which are precisely in point*, the substantive questions must be resolved largely upon general principles of construction which are not different in England from those used in this country." (Emphasis supplied).

PQF reads this to justify them in citing:

> "* * * American cases where it is felt English law has not adequately covered the field in question or where the American law affords a supplementary view." (PQF Op. Br. 12).

But *Landry* does not free PQF to pick and choose at random a "supplementary view" that may support vicarious arguments of PQF's Brief (*e.g.* PQF Op. Br. 13, 25, 29, 31, 32, *passim*). Where English authorities are in point, they are controlling. PQF agrees only when they think a particular English case is helpful. Thus, they cite *Cia. Naviera Vascongada v. British & Foreign Marine Insurance Co., Ltd.* (1936) 54 Ll. L. Rep. 35, which they believe in their favor, and then advise:

> "It is not the role of court to disagree with it as English Law and Usage have been found to govern the contracting parties." (PQF Br. 55).

The Trial Court found that English law is applicable, and that it is to be determined by reference to the Marine Insurance Act, 1906, and to leading marine insurance texts and

cases (R. 277). The sections of the Marine Insurance Act, cited by either side, are reprinted by Underwriters as their Appendix I. They will rely upon its relevant sections and English cases and texts in point, and on American cases in accord.

C. The Insurance Was Void *ab initio* Because of PQF's Failure to Disclose the Material Increases in the Risk Caused by the Increased Gasoline Carrying Capacity of the *Pacific Queen* and the Altered Extra-Hazardous Methods of Carriage and Discharge of that Gasoline.

A. The Marine Insurance Act, 1906, provides:

> "17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.
>
> "* * *
>
> "18.—(1) * * * the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.
>
> "(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk." (App. 1, p. 3).

B. The Court's Findings of Fact, quoted above in the Statement of the Case and documented below in Appendix V with record references, where challenged, clearly establish that:

> a. PQF increased the bulk gasoline capacity from 3,000 to 8,000 gallons (R. 259).
>
> b. This was a material increase in the risk which was not disclosed to Underwriters (R. 260).

c. An even greater undisclosed increase in the risk was accomplished by making extremely hazardous alterations in the method of discharging gasoline by removing permanent drainage plugs at the bottom of the tanks and inserting discharge valves along a passageway where ship's equipment, fishing gear and personnel frequently passed (R. 260).

d. These changes were made after the 1955 survey and prior to May 24, 1957, the attachment dates of the insurances on the PACIFIC QUEEN (R. 260).

e. These increases in the risk are obvious facts that should have been known to anyone with a minimum of experience or understanding (R. 260).

f. That these changes were increases in the risk was certainly known to the owners of the PACIFIC QUEEN, and virtually admitted by them (R. 260).

g. These altered methods of handling gasoline were not in common usage, but were exclusive to the PACIFIC QUEEN (R. 261):

h. PQF's managing owner, Mardesich, had personal knowledge of these gasoline tank and discharge changes which materially increased the risk (R. 261).

i. Neither he nor any of his other partners disclosed these changed conditions to the Underwriters, or to PQF's brokers or to the surveyors (R. 261-2).

j. Neither surveyor, Marquat, now deceased, who made the survey in 1955, nor Elkins, since retired, who made the survey in 1957, knew of the increased gasoline capacity, or of the unsafe or improper gasoline discharge facilities, and there was nothing observable by any reasonable inspection which would have disclosed these changes. In fact PQF's counsel claims the changes were a "simple job that would not take two men thirty minutes." (R. 262).

k. Both marine surveyors were of the highest ability, character and integrity and would not have overlooked any such great increase in the risk (R. 262-263).

1. Underwriters would not have insured the vessel if PQF or their brokers had disclosed to them any or all of the material increases in the risk (R. 264).

Not one of these Findings of Fact is directly challenged by PQF. It does, apparently, by the body of its argument on nondisclosure, challenge the Finding that there was nothing observable by any reasonable inspection which would have disclosed the changes in question to the surveyors. The references to this Finding in Appendix V show that it is not just amply, but is overwhelmingly, supported by the evidence.

In any event, PQF makes no claim whatsoever that it actually disclosed these changes to the Underwriters, brokers, or surveyors. Nor does it challenge the Findings that they constituted material increases in the risk which would, if disclosed to the Underwriters, have resulted in their failure to secure insurance.

PQF's defenses are based solely on the twin propositions that (a) the changes must be presumed to have been known to the insurers, although not actually known by them, and (b) that disclosure of the changes was waived.

These exceptions to the duty of disclosure are set forth in §18(3) of the Marine Insurance Act, 1906, as follows:

> "In the absence of inquiry the following circumstances need not be disclosed, namely: * * *
>
> "(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
>
> "(c) Any circumstance as to which information is waived by the insurer * * * . "

A full discussion of these exceptions to the duty of dis-

closure will be found in Arnould on Marine Insurance, 15th Ed. (1961), §§621-631.

In summary, Arnould states, on the exception dealing with circumstances presumed to be known to the insurer, that:

> " * * * an insurer is presumed to know that it is impossible to make a floating dry-dock as seaworthy as an ordinary ocean-going craft, and is put on inquiry, if he admits seaworthiness, as to the means adopted to strengthen it.
>
> "A knowledge of the political state of the world, of the allegiance of particular countries, of their standing mercantile regulations, of the risk and embarrassment affecting the course of trade contemplated by the insurance, must all necessarily be imputed to the Underwriter, and therefore need not be disclosed by the assured * * * . " (Arnould *supra* §622).

It is not seriously contended by PQF that it was entitled to the benefit of this exception to the duty of disclosure in the case of its carriage of gasoline and methods of stowage, handling and dispensing of same.

On the subject of what ought to be known to an insurer, Arnould goes on to state:

> "On the principle that the assured need not disclose what the Underwriter ought to know, it has been decided in several cases that facts comprised in the general usages of trade need not be communicated to the Underwriter; * * *. But to dispense with communication of anything done according to usage, such usage must be generally and universally known to all engaged in the trade." (Arnould *supra* §623).

Not only was the Pacific Queen's altered method of handling gasoline not a usage "generally and universally known to all engaged in the trade," but, on the contrary, PQF does not challenge the Finding that it was "not in

common usage, but was exclusive to the PACIFIC QUEEN" (R. 261, *supra,* p. 11). Thus the exception to the duty to disclose in §18(3) and (4), relied on by PQF's Brief, p. 30 ff. based on usage, is clearly not available to PQF.

As to the final exception to the duty to disclose, waiver, Arnould states, in §631, p. 597.

> "It was * * * held by the Court of Appeals [in *Mann, MacNeal & Steeves v. Capital & Counties Ins. Co.*] that information that the cargo was of a hazardous character had been waived. Bankes L. J. said that an Underwriter waives any information in relation to what may be fairly described as a parcel of ordinary cargo of lawful merchandise, and also, quoting Lord Esher M. R. in *Asfar v. Blundell* that the rule is satisfied if the assured discloses sufficient to call the attention of the Underwriters so that they can see if they require further information, they ought to ask for it. * * * "

PQF rely heavily upon *Mann, MacNeal & Steeves v. Capital & Counties Ins. Co.* (1921) 2 KB 300. Underwriters do not quarrel with the holding in this case at all, the heart of which is that the rule of disclosure

> "* * * is satisfied if he (the owner) discloses *sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information* they ought to ask for it."

In that case, at p. 306, the Court found under the facts of that case:

> "Petrol contained in iron drums was *proved* to be quite an ordinary and common form of merchandise * * *."

The reason petrol was safe under the facts of *Mann* was explained in a concurring opinion at pages 316-17:

> "* * * (T)he drums containing the gasoline are substantial things, *welded* and not riveted, and *strengthened* against crushing by stiff rims, with the hole for

> filling fitted with a screw cap, and jointed and *tightened up* so that no gasoline can leak out * * * in my view, in this connection it was probably less and certainly not more dangerous than were the claret staves (for wine)."

And, at page 307:

> "* * * Whether disclosure must be made or not is one of degree, *depending upon the circumstances of each particular case * * * the broker must keep himself posted * * * and he must have sufficient information * * * to decide what disclosure he should make * * *.*"

And at page 311, the Court similarly held:

> "*Marine insurances* are affected in ordinary course by agents, insurance *brokers,* whose *knowledge and duty to disclose is in substance coextensive with that of their principals.*"

Thus, the true point made in the *Mann* case is that the disclosure of the nature of the cargo is waived where the cargo is an ordinary and common form of merchandise which can be carried as safely as the common run of cargo. It gives no support to PQF's assertion that disclosure of a unique and extraordinarily dangerous system of handling gasoline is waived by the failure of a surveyor to inquire about it stemming from his ignorance of its existence which existence was not observable by reasonable inspection.

> " 'I can conceive that, if an Underwriter is told: "I propose to ship pyralin," and does not ask: "What on earth is that?," he waives the disclosure to him of the ordinary qualities of pyralin. But, if any particular shipment of pyralin has some peculiar quality which would not ordinarily follow from or be disclosed by saying "This is pyralin," it seems to me that that is clearly a matter which ought to be disclosed.' " Arnould, *supra,* §631.

Here waiver is asserted, apparently, by reason of the fact of a survey. But PQF does not challenge the Findings that

they did not disclose the altered method of handling gasoline to the surveyors, that the surveyors did not know of these alterations, that the altered methods were exclusive to the PACIFIC QUEEN, that they were a simple job that would not take two men thirty minutes. And PQF cite no evidence for their apparent contention that the Finding that the alterations were not observable by reasonable inspection was clearly erroneous, a Finding supported by the overwhelming preponderance of the evidence cited for it in Appendix V to this Brief.

How Underwriters could have waived knowledge of a material increase in the risk, due to alterations not observable by a surveyor on reasonable inspection, is not explained by PQF in its Brief.

Whether deliberately misled or otherwise, insurers are not chargeable with knowledge where the surveyor is uninformed or misinformed. In *Leathem Smith Putnam Navigation Co. v. National Union Fire Ins. Co.*, 96 F.2d 923, (CA 7, 1938) the Court upheld the District Court's findings:

> "*The writing of the insurance policies was based largely on the report* of one Walker, *a surveyor, whose report the insurance companies agreed to accept.* * * * *Libelants'* (*owners'*) *agent* Walker, *a surveyor, made misstatements* of fact to the underwriters * * *. *Insurers were not estopped by reason of failure to make further inquiry,* after reading the Walker report *which contained misstatements material to the risk.* * * * *Consequently* * * * *there was no meeting of minds* in an agreement *for insurance on a vessel which was unseaworthy because* * * * (*of a violation of Coast Guard requirements*)."[1]

> "Appellees (*underwriters*) *are not estopped* by

[1] Actually of the "Board of Supervising Inspectors" who at the time were statutory predecessors of the "Coast Guard" in performing this inspection function.

> Walker's report; *there was no waiver* of compliance with government rules * * * . *The underwriters had the right to believe that the owners of the vessel had complied with the law.''*

The full text of the lower and appellate court opinions are precisely in point here and are particularly invited to the Court's attention.

Continuing, the Seventh Circuit said:

> *''The concealment of material facts exists, even though not intentional. It creates a state of facts that prevents* consummation of an agreement by *a meeting of minds* upon agreed facts * * *.''

This District Court decision, *sub. nom.* The *Material Service,* 1937 AMC 925 was later cited with approval by this Court in: *The Denali,* 112 F.(2d), 953, 956 (CA 9, 1940).

Similarly, in *Porter v. Bank Line,* 17 F.2d 513, 518, (D.C. Va. 1927), the Court considered a survey and said:

> ''* * * *the conclusion* I have reached *is based largely upon* * * * *failure of the owner's representative* * * * *to disclose* fully *to the* Lloyd's representative (*surveyor*) the events of the voyage, together with *the conditions* that * * * (*created*) an *unseaworthy condition.''*

Cf. *Sun Mutual Insurance Company v. Ocean Insurance Company,* 107 U.S. 485 at 505 (1882);

Chicago S.S. Line v. U.S. Lloyds, 12 F.2d 733 (CA 7, 1926); cert. den. 273 U.S. 698 (1926).

It is equally well settled under English law and usage requiring highest good faith that there must be full disclosure:

> *Marine Insurance Act* 1906, §§17 through 20, quoted in *2 Arnould Marine Insurance* (15th Ed. 1961) pp. 1264-65)

The duty to advise the surveyor is italicized by the recent

decision of this Court in *States Steamship Company v. United States,* on rehearing. 259 F.2d 458, 469 (CA 9, 1958). In that case, the Court said:

> "Marine *Surveyor* Wilson *who* then *inspected* the ship for the American Bureau of Shipping testified that he *received no special information concerning the vessel prior to his survey,* and he *knew nothing outstanding against it. * * * The Company itself was chargeable with knowledge* of the pending inspection and *yet it failed through* (its port engineer, and *its manager*) or any other person *to inform the inspectors* of the special conditions attending the ship. In the words used in the *Silver Palm* [*Ninth Circuit,* 94 Fed.(2d) 776] *supra, all these circumstances 'made the more imperative the obligation of the owner and operator to advise' of the special circumstances calling for a special inspection* and a more thorough one than had been given."

In a very recent British case, *The Assunzione,* [1956] 2 Ll. L. Rep. 468, at 486, the Court said:

> "*A prudent shipowner has a superintendent* whose duty it is in the first instance *to go around the vessel finding out the defects, and pointing them out to the Classification Surveyor. A superintendent does not rely on the* classification *surveyor to point out the defects*— at least *it is not good practice* to do so. *The superintendent and the classification surveyor should inspect together and deliberate on what should be done.*"

Thus, under English law and usage, plaintiffs failed to make the requisite full disclosure either to the surveyor employed by Hansen & Rowland or to their own broker, Hansen & Rowland, or to the defendant Underwriters.

Cf. *Porter v. Bank Line,* 17 F.2d 513, 518 (D.C. Va. 1927) reviewing many American and English cases and holding the

> "*failure* of the owner's representative * * * to *disclose fully to Lloyd's representative*"

was the prime reason for a vessel sailing in an unseaworthy condition.

For all of the foregoing reasons, it is submitted that PQF's gesture of asking a surveyor to inspect an unlighted dead ship incident to a primary request to look at some new gillnet boats and incidentally to take a "look" at the PACIFIC QUEEN, and failing to have any owner point out hazards, or advise him of intended changes, or even to have one of the owners who was chief engineer identify himself, or to inform the brokers of present or intended changes, does not fulfill the requirements of *uberrimae fidei* and fair disclosure to Underwriters under either English or American law.

The insurance never attached and was void *ad initio* for failure to disclose material increases in the risks.

D. The Insurance Was Void Because the *Pacific Queen* Was Repeatedly Sent to Sea in an Unseaworthy State with the Privity of the Assured in Violation of Section 39(5) of the Marine Insurance Act, 1906

PQF's Opening Brief, pp. 40-45, does not challenge the Court's Findings (R. 265-8) *supra,* 13-16, of "unseaworthiness," but presents two law questions—the meaning of the terms "*sent to sea*" and of "*privity*" (PQF Op. Br. pp. 41, 43).

The test of seaworthiness under § 39(5) of the Marine Insurance Act, 1906 (App. I, p. 7) is very clear and simple:

> "In a time policy there is no implied warranty that the ship shall be seaworthy *at any stage* of the adventure, but where, *with the privity of the assured* the ship is *sent to sea* in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

Since PQF accepts the Court's Finding that the Pacific Queen was unseaworthy when she was sent to sea in May, 1957, with 8,000 gallons of gasoline aboard and the hazardous discharge system described above, it confesses breach of § 39(5), for the Court found that:

> "Her *continuous* unseaworthiness until her fatal explosion was a proximate cause of her loss." (R. 268)

This encompasses the finding that:

> "The Pacific Queen was unseaworthy each time she was sent to sea on and after May 24, 1957 * * *. (She) was unseaworthy when she left for her 1957 voyage by reason of the hazardous conditions caused by the increased gasoline carrying capacity and, to an even greater extent, by the changed method of piping, valving, and internal methods of discharge of gasoline. This system was grossly unsafe and improper and created a great and serious hazard to life and property. The owners were privy to this unseaworthiness, and knew of these conditions and neglected to take reasonable precautions to correct these deficiencies and to make her seaworthy." (Finding XI, R. 264-5)

The Court concluded that the vessel was sent to sea in an unseaworthy state with the privity of the owners and manager, citing English and American authorities (R. 281-2).

There is no dispute or challenge to Mardesich's participation in authorizing the loading of 8,000 gallons of gasoline, or the hazardous bottom-drainage system. Clearly he was privy to this. Therefore, on this independent ground, the insurance is void under § 39(5).

As Arnould, 15th Ed. § 706, p. 669, states:

> "It is not necessary, (under 39(5) of the Marine Insurance Act) in order to exonerate the insurer from liability, that the unseaworthiness should be the sole

cause of the loss; it is sufficient that the unseaworthiness was a proximate cause of the loss." Citing:

M. Thomas & Son Shipping Co. v. London & Provincial Mar. Ins. Co., (1914) 29 T.L.R. 736; 30 T.L.R. 595 (C.A.);

Cohen v. Standard Mar. Ins. Co. (1925) 30 Com. Cas. 139.

PQF's challenge, both as to the terms "sent to sea" and "privity," applies *only* to the additional unseaworthiness on subsequent stages of its 1957 career, particularly those following the Friday Harbor gasoline spill.

These succeeding "stages" are cumulatively important. When the vessel returned from Alaska, she discharged at Seattle docks. Then she started a second stage, and reentered operating status in the same unseaworthy condition, sailing to Friday Harbor. Her original 3-months operating hull insurance had expired August 24, 1957 (R. 76). PQF agrees that:

> " * * an additional 30-day period of insurance coverage was obtained on September 5th (R. 84) in order to ensure (*sic*) operating insurance during a period when the PACIFIC QUEEN would be broken out of lay-up status * * * (PQF Br. 6)."

This new 30-day period effective September 5, 1957, was the date she entered a second stage and "sailed for Friday Harbor" (R. 85).

At the same time PQF owners, Mardesich and Vilicich, knew and hence were "privy" not only to her original hazardous and unseaworthy condition, as she was still carrying 2,000 gallons of bulk gasoline in her tanks, but they also then knew in addition that in August 1957 the Coast Guard charged a similar vessel, the ALASKA REEFER, in which Vilicich also owned an interest, with violating the Tanker

Act (46 USC § 391(a)) by transporting bulk gasoline without a requisite Coast Guard inspection and certificate (R. 274-5; *supra* 20).

Was the PACIFIC QUEEN "sent to sea" from Seattle to Friday Harbor? The trip took 7 hours (R. 1169). She could make up to 12 knots (R. 1425-6). The Court can take judicial notice that the distance is about 70 miles, which is far greater, for example, than the 20-25 mile width of the English Channel or the North Channel of the Irish Sea. The waters of Puget Sound can be notoriously rough, and occasionally sufficient to founder great vessels. Cf. *The President Madison,* 91 F.(2d) 935, (CA 9, 1937).

PQF would now define "sent to sea" by "Pilot Rules for Inland Waters," 33 CFR Part 80, which are filed under 33 USC § 151, to inform navigators of where the Inland Rules of navigation and the International Rules respectively apply.

> *U. S. v. Newark Meadows Imp. Co.,* 173 Fed. 426, C.C.N.Y., 1909.

These rules relate to navigational signals, lights, etc., in America and have no relation to the words "sent to sea" in the English Marine Insurance Act.

In *New York, New Haven & Hartford R.R. v. Gray,* 240 F.(2d) 460, at 466 (CA 2, 1957), the Court assumed, arguendo, that under § 39(5) of the Marine Insurance Act a "busy car float" was "sent to sea" each time it left its moorings in New York harbor.

Mississippi Shipping Co. v. Zander & Co., 270 F.(2d) 345, 349 (CA 5, 1959) held the words mean "when the ship breaks ground for the purpose of departure."

Section 39(5) applies by its terms to "any stage" in which a vessel is "*sent to sea*" in an unseaworthy condition

with the privity of the owners. The English cases recognize successive stages in a time policy from port to port.

> Cf. *Ashworth v. General Accident Fire Assurance Co.* [1955] I. R. 268, 289, 292.

The Trial Court Finding XI, *supra* 13 ff., and its Conclusion (R. 281) that the vessel was repeatedly "sent to sea" is correct.

Was this "with the privity of the assured"? PQF relies on *Cia. Naviera Vascongada v. British & Foreign Marine Insurance Co., Ltd.* (1936) 54 Ll. L. Rep. 35. They contend that there is no privity unless Mr. Mardesich deliberately refrained from an examination which might have revealed that gasoline must have soaked and impregnated large parts of the wooden area of the ship and that the omission of PQF to take precautions beyond washing down the affected areas and the employment of blowers cannot make the owners privy to any unseaworthiness which resulted from this inadequate response to the challenge posed by the gasoline spill (PQF Br. 43 ff.).

As noted above, PQF's only challenge to "privity" is restricted to the stages of Pacific Queen's career after the gasoline spill. PQF concede privity to the independent unseaworthiness caused by the increased gasoline carried under the extraordinarily hazardous conditions found by the Court and in violation of the Tanker Act, and thus, in effect, confess to the correctness of the Trial Court's judgment (Finding IX, X, *supra*, 9, 11).

The gist of the English trial court's holding in *Vascongada* is at pp. 57-8:

> "I have held that the Gloria was unseaworthy when she left Larne [a port on the Irish sea. The condition causing the unseaworthiness occurred as the vessel was leaving that port]. Were the plaintiffs privy to her so

doing? To prove that they were the defendants must establish privity in someone in authority in the plaintiff company. That person in the present case is Mr. Zubizaretta, who was in charge of the engineering side of the plaintiff company's business, [and who was, at all times material, located *in Bilbao, Spain*]. * * * It is contended by * * * the plaintiffs, that actual knowledge of the unseaworthiness to which the loss is attributable, must be proved. * * *

"[Defendant] contends that when there has been a deliberate omission to have the ship surveyed when according to the rules of her Society a survey is due, where the age of the ship is such that her owners must have realized that only regular surveys could obviate the risk of her going to sea in an unseaworthy condition, the owners are privy to any unseaworthiness, which the survey, if held, would presumably have discovered, * * * I think that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy, and deliberately refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness of his ship. But the mere omission to take precautions against the possibility of the ship being unseaworthy cannot, I think, make the owner privy to any unseaworthiness which such precaution might have disclosed."

This is not applicable to the Pacific Queen except that it confirms that § 39(5) applies "at any stage." In *Vascongada,* the owner was a thousand miles away in Spain when an accident causing unseaworthiness took place on the Irish Sea. He did not even learn of it until after the loss of the vessel. But, in the Pacific Queen, the owners caused the original and continuing unseaworthiness by their own acts and, before the second stage, from Seattle to Friday Harbor, the owners knew Coast Guard inspection was required; and before the third stage from Friday Harbor to Seattle,

the managing owner traveled to Friday Harbor and knew on the day it happened that an extraordinarily serious further unseaworthiness resulted from a 600-gallon gasoline spill. He inspected it, treated it as "almost trivial" (R. 240), gave no orders relating to the inadequate clean-up or toward preventing further gasoline spills, and failed to exercise due diligence to render his vessel seaworthy (Finding XIII, R. 272-3; *supra* 19).

The Pacific Queen case is much closer to a case affirmed by the Court of Appeals, *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, 1914 KB 419; aff'd. 1915 AC 705. There the question was whether a loss had happened without "actual fault or privity" under the applicable English statute. The parallels to Pacific Queen are striking. A cargo of benzine on board ship was lost by a fire caused by unseaworthiness of the ship due to defective boilers. The owners were one limited company. The managing owners were another such company. The managing director of the latter company was a registered managing owner and took the active management of the ship on behalf of the owners. He knew, or had the means of knowing, the defective condition of the boilers, but he gave no special instructions to the captain or chief engineer regarding their supervision and took no steps to prevent the ship putting to sea with her boilers in an unseaworthy condition. The lower court's opinion reads, in relevant part, as follows at 1914 KB 419, 440:

> "A mere examination of the deck log * * * would * * * have been useful in shewing whether steam power was failing and therefore leakage increasing. Careless the engineers might be, but I see no reason why they should keep such things out of the log * * *. It is true that the learned Judge found, and justly found, that the chief engineer was a lying witness, though to be sure the man lied on his oath to promote, as he

> thought, his master's interests * * *. If the managers had used these sources of information, which they unjustifiably neglected, they would have learned, and learned in time, how much worse the condition of the boilers was. * * * I recall that with proper diligence, the owners might have prevented all of this and must have known the special perils attending the transport of benzine in bulk, for it was their trade. When these owners ask this Court to find that the fire, which naturally ensued in the circumstances, 'happened without their actual fault or privity,' I refuse."

The Court of Appeals affirmed, holding the owners had failed to discharge their burden of proving that the loss happened without their actual fault or privity" [1915] A.C. 705.

Closer still to the facts in the PACIFIC QUEEN, and also arising under the Marine Insurance Act, 1906, § 39(5), is *Ashworth v. General Accident, etc. Assurance Corporation* [1955] I.R. 268. In that case the vessel also operated in successive stages. She left her final port in an unseaworthy condition, with the owner having full knowledge of a condition which both courts found rendered her unseaworthy. To the owners' claim that she was not sent to sea "with the privity of the assured," the trial court stated, at [1955] I.R. 268, 279:

> "Captain Ashworth was, I am satisfied, fully aware of the ship's condition * * *. If he did not actually give orders to [leave port], he certainly did nothing to prevent that from happening. He was, in my view, clearly privy to her leaving Arclo in the condition in which she did leave it. * * * I have found that she was then unseaworthy. In my opinion, it is unnecessary to inquire any further into Captain Ashworth's state of mind. I do not think I have to determine whether he posed himself, and answered in the affirmative, the question: Is the ship unseaworthy? He had all the materials neces-

> sary to form a judgment. He was privy to the state of things which rendered the ship unseaworthy and he was privy to her going to sea in that state."

Despite this holding, the Trial Court found in favor of insured on another issue, but the Supreme Court of Ireland reversed, two to one, in favor of Underwriters. The Chief Justice held at [1955] I.R. 268, 287:

> " * * * Captain Ashworth was well aware of the condition of ship when she left Wexford. He was, furthermore, aware of the defects which developed upon the journey and the causes which compelled her to put in to Arclo. The repair which he directed to be done to the engine could at least have put her in the same condition as that in which she left Wexford. He must have known that he was taking a very great risk in allowing the ship again to sea in that state. Although it may not be necessary to concern oneself with the state of his mind beyond finding that he was aware of the defects which made his vessel unseaworthy, it seems very difficult to avoid the conclusion that he must have known that he was sending his ship out, to use the terms of the definition cited, in such a state that she was not 'reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.' "

The second Justice for the majority stated, on this subject, at [1955] I.R. 268, 291:

> "The respondent was in Arclo * * * and I see no reason for questioning the validity of the trial Judge's finding that he was at that time fully aware of the condition of the ship. * * * he did nothing to repair the serious leakage in the ship nor did he do anything to supply an auxiliary means of pumping should the port engine fail. In all these circumstances I am of the opinion that the ship left Arclo in an unseaworthy condition with the privity of the assured."

The entire question is summed up in *M. Thomas & Son*

Shipping Co. (Ltd.) v. The London and Provincial Marine and General Insurance Co. (Ltd.), (1914) 30 T.L.R. 595, at p. 596, as follows:

> " * * * words in s. 39, sub-s5, of the Marine Insurance Act, 1906, 'Where with the privity of the assured a ship is sent to sea in an unseaworthy state,' meant where the owner was privy to the state of things which in fact rendered the ship unseaworthy."

Cf. *Petition of Boat Demand*, 160 F.Supp. 833 (D. Mass. 1958).

It is submitted on the facts as found and on applicable law the insurance is void under § 39(5) of the Marine Insurance Act, 1906, because the PACIFIC QUEEN was repeatedly sent to sea from the beginning of 1957 until her final tragic explosion in an unseaworthy condition with the privity of the assured.

E. The Loss of the *Pacific Queen* by Explosion Is not an Agreed Peril Under the Inchmaree Clause Because the Loss Resulted from Want of Due Diligence by the Owners of the Vessel, or Any of Them, or by the Managers

PQF's Brief, p. 26, accepts *arguendo* the facts on the Inchmaree defense found by the Court's Oral Opinion (Br. 26-7). We must assume PQF similarly accepts *arguendo* the Court's Findings XII and XIII on this defense. Therefore, as this Court held in its most recent Inchmaree decision, *Founders Insurance Company v. Rogers*, 281 F.(2d) 332 (CA 9, 1960):

> " * * * the issues presented for our review are the narrow ones of the sufficiency of proof to support the findings of fact and the conclusions of law * * * under the insurance contract."

"The sufficiency of proof to support" each sentence of Findings XII and XIII is fully annotated in Appendix V, pp. 33-38. Those findings establish amongst others that the

Pacific Queen was destroyed by a gasoline explosion and not by fire (R. 269), that there was no credible evidence of arson (R. 269), that no pre-existing fire existed (R. 269), that the possibility it was an ammonia explosion is remote (R. 270), and that there was a want of due diligence by the owners and manager (R. 272-274).

Under these established facts, judgment for Underwriters must be affirmed because the general perils clause does not apply to explosions. *Arnould, supra* (15th ed.) § 819, p. 775.

The general perils clause does include the word "fire," but the Pacific Queen was destroyed by an explosion, and not by fire (Finding XII, R. 269, *supra*, 16, 17). The term "fire" does not include an explosion. In *Arnould supra,* (15th ed.) ch. 23 analyzing "Losses by the Perils Insured Against," his commentary on "fire" § 819, p. 775, states:

> "a loss by explosion of steam is not, however, within the general words"

of "perils of the sea," citing the famous case which gave the Inchmaree clause its name, *Thames & Mersey Mar. Ins. Co. v. Hamilton* [1887], 12 App. Cas. 484, 500.

There is no distinction in principle between a loss by explosion of steam, or of gasoline, or of ammonia. As stated in *Eldridge, Marine Policies* (2nd Ed., London, 1924) pp. 146-7:

> "* * * in the case of the Inchmaree (where the question went to the House of Lords), the damage [by explosion] had been caused by a check-valve becoming choked with salt, and as a result the donkey-pump was damaged.
>
> "It was held that *there was no distinction in principle* between that case and the case of [an explosion of steam] and that the underwriters could not be held liable, as the loss had not been caused by any of the perils set out in the policy, nor by perils *ejusdem gen-*

eris, so as to come within the general words * * * (*Thames and Mersey Mar. Ins. Co. Ltd. v. Hamilton,* 12 App. Cas. 484)."

As a result, marine insurance coverage was broadened by the addition of the Inchmaree clause. Eldridge, *supra,* p. 146, *Saskatchewan Government Ins. Office v. Spot Pack,* 242 F.(2d) 385, 391 (CA 5, 1957). It reads:

"This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel.

Explosions on shipboard or elsewhere.

Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part).

Negligence of Master, Mariners, Engineers or Pilots. [P]rovided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.

Masters, Mates, Engineers, Pilot or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel." (R. 82)

Dover, Analysis of Marine and Other Insurance Clauses —(London, 1950) summarizes established English Law and Usage at pp. 33-4:

"*The* (INCHMAREE) *clause does not remove from the owners* of the vessel *or* from their *managers* the obligation to *exercise due diligence; if any loss* or damages within the clause *results from lack of such due diligence, the insurers are not liable therefor.*"

Cf. *Founders Insurance Company v. Rogers,* 281 F.2d 332 (CA 9, 1960);

Read v. Agricultural Ins. Co., 1935, 219 Wis. 580, 263 N.W. 632 (1935);

Wigle v. Aetna Casualty & Surety Co., 177 F.Supp. 932 (ED Mich, 1959);

Baggaley v. Aetna Ins. Co., 111 F.2d 134 (CA 7, 1940).

PQF's Opening Brief cites no contrary cases or authorities, British or American, on Inchmaree. They cite

Saskatchewan Government Ins. Office v. Spot Pack, supra, and

Templeman, Marine Insurance (1948)

for the proposition that the Inchmaree clause broadens coverage to include a variety of risks not embraced in the general perils of the sea clause. Underwriters agree, but such generalities do not alter the established facts, or applicable law here.

Templeman, supra, 318, citing *Hutchins Bros. v. Royal Exchange Assce. Corpn.* (1911) 2 K.B. 398, states:

> "*To hold that this 'Inchmaree Clause' covered* the cost of that (loss) *would* be to *make it not* an *insurance* clause *but* a *guarantee* clause, a warranty that the hull and the machinery were free from latent defects * * *."

He also points out that coverage broader than Inchmaree is available if an owner wishes to pay for it.

Next, PQF cites *Vascongada.* It was not an Inchmaree case but a § 39(5) unseaworthiness case, which was distinguished above, pp. 36, *passim.*

Lastly *Tropical Marine Products v. Birmingham Fire Ins. Co.,* 247 F.2d 116 (CA 5, 1957) is cited. The key to *Tropical,* under Inchmaree, is similar on its facts to *Vascongada* under § 39(5). The Court found at pp. 120-1, that the defect, giving rise to an Inchmaree claim was:

> "not *known* or *discoverable* by the owner or one in privity with him."

because:

> " * * * the owner was in the United States and on this record all was left to the master. *There is no evidence that the non-resident owner had personal knowledge of this condition* * * *."

and hence there was no want of due diligence. This is in sharp contrast with the findings here. The Court expressly found there was "want of due diligence by the owners and manager" (Finding XIII, *supra*). The gasoline defects were both "known and discoverable" by PQF's owners including Mardesich, also its manager, who was on the job and had "personal knowledge of this condition." Such "want of due diligence by the owners, or managers" bars recovery under the Inchmaree clause.

Cf. *Chicago Steamship Lines v. United States Lloyds*, 2 F.2d 767 (ND Ill. 1924) aff'd 12 F.2d 733 (CA 7, 1926), cert. den. 273 U.S. 698 (1926);

Leathem Smith-Putnam Nav. Co. v. National U.F. Ins. Co., 1937 AMC 925 (ED Wis. 1937) aff'd 96 F.2d 923 (CA 7, 1938).

Nor is § 55(2) pertinent here for its key is liability for "a peril insured against." And, as shown above, except as contained in the Inchmaree clause, explosions are not such a peril. Thus due diligence by the owner is an express condition to recovery under Inchmaree.

Therefore the judgment must be affirmed on the independent grounds of Inchmaree.

F. Even if the Insurance Attached, it was Void Because the PACIFIC QUEEN Transported Bulk Gasoline in Violation of the Tanker Act. This was a Separate and Additional Violation of §39(5) of the Marine Insurance Act and was also an Independent Want of Due Diligence by the Owners and Managers under the Inchmaree Clause.

The Tanker Act provides in 46 USC §391a:

> "ALL vessels, regardless of tonnage, size, or manner of propulsion * * * that shall have on board any inflammable or combustible liquid cargo in bulk, * * * shall be considered steam vessels for the purposes of Title 52 of the Revised Statutes and shall be subject to the provisions thereof: * * *."[4]

The Court held that the statute:

> "* * * in the most sweeping terms of which the English language is capable, makes it plain that the carriage of bulk gasoline, other than as the vessel's 'fuel or stores,' is unlawful unless the provisions of the Act are complied with, which plaintiffs admit was not done. A fishing vessel, however, large or small, must comply with the Tanker Act if it carries bulk gasoline except as its 'fuel or stores'." (Concl. VII, R. 283)

This conclusion is abundantly supported by the statute's use of the word "all," its legislative history and court decisions:

> "We need not, however, go beyond the use of the word 'all.' It covers everything."
>
> *New Jersey Zinc Co. v. Singmaster* (DCNY 1933) 4 F.Supp. 967, 972; modified on other grounds, 71 F.2d 277 (CA-2, 1934).

"All" is the most "comprehensive word * * * in the English language":

> *Moore v. Virginia Fire & Marine Insurance Company* (Va. 1877) 28 Grat. 508, 516, 26 Am. Rep. 373;
>
> *Seattle v. Hindeley,* 40 Wash. 468, 470, 82 Pac. 747 (1905);
>
> *Travelers Insurance Co. v. Cimarron Insurance Co.,* 196 F.Supp. 681, 682, D.C. Ore. (1961).

Cf. *Baltimore & Ohio R. Co. v. Jackson,* 353 U.S. 325, 330-1 (1957).

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[4] Appendix II contains its full text.

The legislative history[1] of the Tanker Act confirms the Congressional intent to safeguard life and property in carrying bulk gasoline by requiring Coast Guard inspection and approval of all such vessels.

In hearings on H.R. 12840 before House Committee on Merchant Marine and Fisheries (74th Cong.) of May 29, 1936, which became 46 USC §391a, the Director of Steamboat Inspection sought to reduce the hazards of:

> "the ever-increasing transportation of gasoline by small cargo vessels and barges by subjecting them to inspection and regulation to prevent explosion and fires."

Prior Hearings[2] referred to the "great loss of life and terrible menace to tranportation systems that surround them" (p. 49) and to bursting of "discharge hoses" or "flexible tubing" (pp. 50, 52) and hazards of installing concealed pipe connections and the dangers of wooden hulls and to the government's purpose to:

> "Compel fishing vessels to come under regulation." (p. 70)

Cf. *Kelly v. Washington,* 302 U.S. 1, 6, 8 (1949)

Under its 1957 Joint Venture Agreement Pacific Queen carried in excess of 50% of its bulk gasoline as cargo for gillnet boats which had no relation to her, and also sold part of this bulk gasoline to independent fishermen in Alaska. (Op. R. 247; Finding XV, R. 275-6) Gasoline was thus transported in bulk as cargo.

Phile v. The Anna, 1 Dall. 216, 226, Ct. Com. Pl. Phila. Co. (1 U.S. 1787);

U. S. v. Ketchikan Mchts. Charter Asso., (D.C. Wash. WD.), 1959 AMC 2085, 2090-1.

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[1] Cf. *Baltimore & O. R. Co. v. Jackson, supra,* 353 U.S. at 333.

[2] *House Committee on Merchant Marine and Fisheries* on *Safety of Life and Property at Sea,* 74th Cong. 1st Sess., Part 1, Revision of Inspection Laws, March 6, 7, 8, 13, and 15, 1935.

PQF asserts (Br. 47) that this was "encouraged by all departments of the government in order to assist Alaska in obtaining some sort of balanced economy." Not one word in the record supports such an assertion. No branch of the government encourages law violation. Long before the fatal explosion of the PACIFIC QUEEN in 1957, the U. S. Coast Guard Officer in Juneau, Alaska, addressed a mimeographed letter to all concerned in the petroleum, fishing and bulk carriage field, reading in part:

> "In early September 1956 a tally scow caught fire and burned fiercely for many hours. The tally man lost his life in the fire.
>
> " 'Subsequent investigation revealed that approximately 1,000 gallons of fuel were carried on board the scow. It is obvious that this quantity is in excess of the needs of a nonselfpropelled vessel, and the conclusion is that oil was dispensed to fishing boats * * * It is felt that owners and operators of such scows should be cautioned with *any vessel* regardless of tonnage * * * *which transports bulk petroleum must* first *be inspected and* must *have on board a certificate of inspection.*" (R. 1287).

Further warnings followed (R. 1287-1295). PQF's Exs. 25 and 26 enumerate PACIFIC QUEEN's violations of pertinent Coast Guard regulations.

On August 15, 1957, a month before the fatal explosion, the Coast Guard Officer boarded the M/V ALASKA REEFER and advised Mr. Vilicich that they would cite him for violation of regulations (R. 1283-4).

The Coast Guard found as to PACIFIC QUEEN:

> "That the exception in the Tanker Act for vessels carrying stores is not applicable if gasoline is transported for and dispensed to boats not carried by the mother ship, even though owned by the same owner as the mother ship, and particularly so when sold to inde-

pendent small fishing boats. Such gasoline, *pro tanto,* does not constitute stores. Even if it should be held to constitute stores * * * the exception * * * would relegate the (PACIFIC QUEEN) to the operation of the Dangerous Cargo Act, since she is in excess of 500 tons." (R. 1092)

The PACIFIC QUEEN's operations in 1957 were illegal *ab initio* for failure to comply with the Tanker Act, although it should be noted that the Trial Court's Conclusions did not go this far. Discharge valves on the bottom of interior bulk gasoline tanks were forbidden under Coast Guard regulations (R. 1270).

PQF knew that they were violating Coast Guard regulations. In August 1957, almost a month before the casualty, Steve Vilicich advised his brother, John Vilicich, a PQF owner and marine insurance broker, and August Mardesich, PQF's managing partner and a lawyer, that a similar vessel, the ALASKA REEFER owned by the Vilicich family, had been cited for violating the Tanker Act by carrying bulk gasoline (Ex. 409, TP. 71-2, 76-8, R. 1650-53). But PQF made no effort to discharge their remaining 2000 gallons aboard the PACIFIC QUEEN, or to correct the more dangerous situation aboard her.

One of PQF's partners (Concl. X, R. 285-6), William Peck, testified that, when he was Chief Engineer of the PACIFIC QUEEN, he and another partner, Hull, suggested to Mardesich, Breskovich, Barovic and Jonsich, that they obtain Coast Guard inspection but they refused and therefore the PACIFIC QUEEN was not inspected (R. 1684-6).

Peck also testified it was a want of due diligence for the vessel to carry bulk gasoline aboard in the hazardous condition described above (R. 1680-1689).

Under English Law and usage only a

"lawful marine adventure may be the subject of marine insurance";

and

> "there is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner."
>
> *Marine Insurance Act* §§ 3(1), 41.

9 *Chalmers, Marine Insurance Act,* 1906 (5th ed., London, 1956) citing §41, *supra,* and *Waugh v. Morris* (1873) L.R. 8 Q.V. 202, states:

> "A contract to do a thing which cannot be done without a violation of the law is void, whether the parties know the law or not."

Arnould Marine Insurance, § 738 (15th ed., 1961) states at page 696:

> "it is * * * obvious that no court, consistently with its duty can lend itself to the enforcement of a contract which * * * necessarily involves a violation of the laws the court is bound to enforce."

Under English law and usage where an owner knowingly permitted the vessel to sail *without a certificate* and part of its cargo was on deck and in violation of English law, purported insurance is void.

Cunnard v. Hyde (1859), 29 L.J.Q.B. 6;

Accord: *Perkins v. Dick* (1809), 2 Campbell 221.

Where a vessel sailed without a license in violation of an Act of Parliament, Lord Ellenborough held the insurance was void even though the prohibited goods formed a very small portion of the venture. The court said:

> "I have no scales to weigh degrees of legality."

Cf. 2 *Arnould,* §749, pp. 675-6.

American cases are accord such as *United States Bank v. Owens,* 2 Peters (27 U.S.) 527, 538-9 (1829); quoting with approval *Watts v. Brooks,* 3 Ves. Jr., 612; and more recent ones as *Lineas Aereas Colombianas Exp. v. Travelers' Fire I. Co.,* 257 F.2d 150, 154 (CA 5, 1958), where illegality was

held to have avoided the policies because, among other things, it would if known have been a factor which the insurers would consider of underwriting importance. Compare *Thompson v. Hopper,* 6 E. & B. 172; (1856) 119 Eng. 833, *supra,* "the law gives it as security to the insurer so that insurance may be a prudent mercantile investment."

Similarly in Canada, the operation of a plane in violation of regulations was illicit and avoided the policy.

Obolski Chidouganau Mining Co. v. Aero Ins. Co. [1932] Canada SC 540 (1932) 3 D.D.L.R. 25.

Note 9 ALR 2d 583-4

But PQF now asks how violation of the Tanker Act can constitute unseaworthiness or negligence or want of due care (PQF Op. Br. 46). The answer is Finding XIX, R. 278, which is unchallenged that:

> "If the vessel had been inspected by the Coast Guard, the gasoline discharge facilities below deck would not have been approved."

A vessel operating in violation of recognized safety standards is unseaworthy.

Cf. *Kernan v. American Dredging Co.,* 355 U.S. 426, 427-8.

It is axiomatic that violations of safety laws, whether on ship, or the highways or elsewhere, are frequently acts of negligence or want of due diligence.

Coast Guard regulations have the force of law.

Belden v. Chase, 150 U.S. 674, 698 (1893);

Petition of Skiva A/S Julund, 250 F.2d 777, 786 (CA 2, 1957 per 9th Cir. J. Pope).

It was the duty of PQF to make application for inspection and to obtain a certificate to transport bulk gasoline.

46 CFR Part 31, § 31.01.15.

An early case, *The Jacob G. Neafie,* No. 7156, 13 Fed. Cas.

266 (1875, D.C.N.Y.), explains the necessity of imposing this duty upon the owners.

> "*The intention of the statute*[1] *is* manifestly *to cast upon the owner* of a vessel *the reponsibility of setting in motion the local inspector by a written application;* and it proceeds upon the presumption that the inspectors, being public officers, will discharge their duty when applied to. *This construction is necessary to preserve the efficiency of the statute. To construe it otherwise is to leave it optional with the owner of the vessel whether his vessel be inspected or not, for the duty to inspect, and perhaps also the power, is dependent upon the fact that written application for inspection is made* * * *."

PQF did not comply for the 1957 season. The application could have been made to local Coast Guard authorities on the very simple form which PQF's owner Breskovich had made for the 1949 voyage of the PACIFIC QUEEN carrying reefer cargo to Hawaii (PQF Ex. 45-1, designated but not printed).

Finally, PQF had the burden of proof to show their claim was within the perils insured against.

PQF's Brief, p. 13-14, cites two cases on burden of proof, *Hart-Bartlett-Sturdeman Grain Co. v. Aetna Ins. Co.,* 293 S.W.2d 913, 365 Mo. 1134 (1956) and *Hartford Fire Ins. Co. v. Empire Coal Co.,* 30 F.2d 794 (CA 8, 1929). Both relate to inland policies which covered explosions without any Inchmaree exclusion for loss that results from want of due diligence of the owners or manager.

In *Crist v. U. S. War Shipping Administration,* 163 Fed. 2d 145, 152 (CA 3, 1947) the court held:

> "It is too well settled to require citations that the burden of proving a loss by a peril insured against is on the insured."

[1] Prior statute substantially same as 46 CFR Part 31, 31.01.15.

Accord: *Indemnity Marine Assurance Co. v. Cadiente,* 188 F.2d 741 (CA 9, 1951);

Solberg v. Western Assurance Co., 119 F.23 (CCA 9, 1902).

The relevant issue in burden of proof is a procedural rule predicated on statutory fault. Its roots are imbedded in English marine insurance law. The leading case in Great Britain is *The Fenham*, 23 L.T. (N.S.) 329-330 (F.C.) L.R. 3 F.C. 212 (1870); 6 Moo. P.C. N.S. 501. There the English Court held that the violation of a statutory duty to show lights imposed a burden of proof on the violator to show that the violation could not possibly have contributed to this disaster. The British Court said in part:

> "* * * *it is of the greatest possible importance,* having regard to the Admiralty regulations and to the necessity of enforcing obedience to them, *to lay down this rule* * * *, the burden lies on her to show that the non-compliance* with the regulations *was not the cause of the collision.*"

In America there followed the celebrated *Pennsylvania* case, 86 U.S. (19 Wall) 125 (1873). It reviewed English law and cited with approval *The Fenham.* The statutory fault related to fog signals. The Supreme Court said at page 136:

> "*In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of a statute.*"

After quoting from *The Fenham* the Court recognized that this is a heavy burden of proof:

> "In some cases it is possible to show this with entire certainty. In others it cannot be. * * * To go into the inquiry whether the legislature was not in error * * * was out of place. It would be substituting our judgment for the judgment of the lawmaking power."

This case has been followed a host of times.

It is obviously difficult to find an exact parallel in British or American law. We start therefore with the basic principle, and apply it as near as can be by analogy to parallel cases. As was said by Justice Holmes:

> " 'There are special reasons for keeping harmony with the Marine Insurance Laws of England, — the great field of this business, * * *' ."
>
> *Queen Ins. Co. v. Globe Ins. Co.,* 263 U.S. 487, 492-3.

This burden of proof principle has been applied in various insurance cases involving violation of Coast Guard regulations.

The Material Service, 1937 AMC 925 (E.D. Wis. 1937) cited with approval in

The Denali, 112 F.(2d) 953, 956 (CA 9, 1940);

The Material Service, on appeal, *sub nom. Leathem-Smith Putnam Nav. Co. v. Nat'l. U. Fire Ins. Co.*, 96 F.2d 923, 927 (CA 7, 1938);

Richelieu Navig. Co. v. Boston Ins. Co., 136 U.S. 408, 422-3 (1890);

The Princess Sophia, 61 F.2d 339, 347 (CA 9, 1932).

The failure to comply with the inspection law has similarly been invoked to prove that the owner is not entitled to the benefit of the limitation of liability.

The Annie Faxon (CCA 9, 1896) 75 F. 312, 320;

The Boat Demand (DC Mass. 1958) 160 F.Supp. 833;

States S.S. Co. v. United States (CA 9, 1957, 1958) 259 F.2d 458 (on rehearing);

Petition of Oskar Tiedmann & Co., 183 F.Supp. 129, 130-1 (D.C. Del., 1960), unsafe operation of tanker leaving condition "*as potentially dangerous as a live bomb.*"

In addition, the rule in *The Pennsylvania* has been held applicable:

> To *a salvage claim, Waterman S.S. Corp. v. Shipowners & Merchants Towboat Co.* (CA 9, 1952), 199 F.2d 600;
>
> To *berthing, Standard Transp. Co. v. Wood Towing Corp.,* 64 F.2d 282 (CA 4, 1933).
>
> To *a claim for damages from grounding, Pittsburgh S. E. Co. v. The Atomic,* D.C. Mich., 1952, 107 F.Supp. 631.

The rule is well summarized in *the Lansdowne* (D.C. Mich. 1900) 105 Fed. 436, 443:

> "Both the American and English courts hold that where a vessel has disregarded a rule of navigation, it is incumbent upon her to show, in case of collision *or other disaster* that the violation of the statute not only did not but could not have contributed to the collision."

It seems clear that, under the rule of the *Pennsylvania* case, following *The Fenham* and especially as enunciated in *The Material Service,* 1937 AMC 925, aff'd. 96 F.2d 923, 927, and cited with approval by the 9th Circuit in *The Denali,* 112 F.2d 953, 956, plaintiffs may not recover on this ground of defense unless they can prove that their unlawful carriage of bulk gasoline could not possibly have contributed to the casualty.

> "The underwriters had a right to believe that the owners of the vessel had complied with the law."
>
> * * *
>
> "Inasmuch as libelants failed to comply with the (Coast Guard) regulation, they had the burden of showing that their default did not contribute to disaster and did not meet the burden."
>
> *Leathem-Smith Putnam Nav. Co. v. Nat'l U. F. Ins. Co.,* 96 F.2d 923, 927, 928 (CA 7, 1938).

G. Hull, Peck and Royer Were Partners in Pacific Queen Fisheries at the Time of the Loss, Were Necessary Parties Plaintiff to This Action, and Their Admissions Were Binding Upon PQF.

Whatever its nature, it is admitted by all concerned that Hull, Peck and Royer had some type of interest in PQF. Hull states his interest to be worth about $5,000 (R. 1497-1499) and the interests of Peck and Royer are at least half that large (See Exhibit 376, designated but not printed). Clearly each of these persons has a substantial interest in the outcome of this litigation.

The sale of an interest in a partnership does not of itself make the purchaser a partner. RCW 25.04.270 (1) states:

> "A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignees, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs * * *."

United States v. Coson, 286 F.(2d) 453 (CA 9, 1961), cited in PQF's Opening Brief 50, stands for exactly this proposition.

But there was an agreement in PQF. The sale of an interest in the partnership was specifically covered by the partnership agreement. Article XI of both the agreement dated April, 1949 (Ex. 265, designated but not printed) and that dated April, 1957 (Ex. 274, designated but not printed) states:

> "Any part owner desiring to sell his interest in said vessel shall have the right to do so provided that said interest is first offered to the other owners. * * * Should none of the other owners desire to purchase the interest of the selling owner, the selling owner shall have the privilege to sell his interest to any other person,

provided said other person is acceptable to the remaining owners."

(R. 1311-1312, 1315-1316, 1619-1620, 1663-1665).

Breskovich and Mardesich both admit that Breskovich abided by this requirement of the partnership agreement, that the other partners turned down the opportunity to buy the portion of Breskovich's interest which was for sale, and that the other partners agreed to the sale to Hull, Peck and Royer (R. 1314-1315, 1619-1620). Thereafter, Hull and Peck, if not Royer, attended meetings of PQF (R. 1673). Mardesich referred to Hull, Peck and Royer as partners (R. 1619). The income tax returns for PQF, prepared by Hull, all refer to Hull, Peck and Royer as "partners" without differentiating in any manner from the other partners of the venture (Exs. 371-373, 376-377, all designated but not printed).

It is clear, therefore, by the acts of the partners themselves in including Hull, Peck and Royer in partnership conferences, in referring to them as partners both orally and in their tax returns, and in accepting them as per the partnership agreement itself, that Hull, Peck and Royer are full partners in the Pacific Queen.

As partners in PQF, Hull, Peck and Royer are necessary parties plaintiff to this action. *Seltzer v. Chadwick,* 26 Wn.(2d) 297, 173 P.(2d) 991 (1946).

Because Hull, Peck and Royer are partners in PQF and necessary parties plaintiff herein, admissions against the interest of PQF made by Hull and Peck, either by deposition or on trial, are admissible against PQF. 40 *Am. Jur. Partnership,* Sec. 443.

See also RCW 25.04.110; *Akers v. Lord,* 67 Wash. 179, 121 Pac. 51 (1912); *Merrill v. O'Bryan,* 48 Wash. 415, 93 Pac. 917 (1908).

Moreover, the proposition that the admissions or decla-

rations against the interest of PQF, made by Hull and Peck are admissible against the firm, does not depend upon their formal status of partners. It is sufficient that they had a substantial pecuniary interest in PQF, as admitted by all of the partners. 20 *Am. Jur. Evidence,* Sec. 589.

The damaging admissions made by Hull and Peck are included in the portions of their depositions printed in the record, references to which are made in Appendix V relating to contested Findings of Fact.

H. Suit Against Respondent Buffalo Insurance Company Is Barred by a Contractual Limitation of Action.

Pursuant to an agreement dated June 1, 1951, as subsequently amended, Hansen & Rowland, Inc., are authorized by Talbot, Bird & Company, as marine manager for Buffalo Insurance Co., to receive and accept proposals for marine insurance for defendant, Buffalo Insurance Co., in the States of Washington, Oregon and California. Pursuant to this agreement, Hansen & Rowland, Inc., was supplied with a number of blank policy forms of Buffalo Insurance Co., each serially numbered by the company. As each policy is executed, it must be accounted for, and Hansen & Rowland was required to supply copies of all information on risks to which it committed defendant, Buffalo Insurance Co., to Talbot, Bird & Co. (R. 876-888).

On June 10, 1957, Hansen & Rowland filled in all necessary insurance information on a blank form of Buffalo Insurance Co. policy, but did not countersign it. Three copies of a "Daily Report" were received by Talbot, Bird & Co. from Hansen & Rowland not later than June 25, 1957. This "Daily Report" included carbon copies of the information on the specific risk appearing on the original policy, but it

did not include either the printed material on the policy or the space for countersignature (R. 882-888; Ex. 281-1).

Shortly after filling out the Buffalo policy, Hansen & Rowland filed it in its correspondence file on "PQF" as their broker. This file also contained the other policies issued by defendants Utah Home and Atlas (R. 894-898; Exs. 281-283).

Under the circumstances, PQF makes no claim that the Buffalo Insurance policy was not delivered. Delivery was accomplished by its transfer into the file which Hansen & Rowland kept for PQF as the latter's brokers. 1 *Appleman, Insurance Law & Practice,* § 132; *Riley v. Aetna Insurance Co.,* 80 W. Va. 236, 92 S.E. 417, LRA 1917E 983 (1917); *Frye v. Prudential Insurance Co.,* 157 Wash. 88, 288 Pac. 262 (1930).

It is admitted that the Buffalo Insurance Co. policy here in question is not countersigned. It is also admitted that the policy provides:

> "This policy shall not be valid unless countersigned by the duly authorized Agents of this Company."

Faced with a similar question, the Supreme Court of North Dakota stated in *Ulledalen v. United States Fire Insurance Co.,* 74 N.D. 589, 23 N.W.2d 856 (1946) at 868:

> "The counter-signing of the policy by the agent is a ministerial act of authentication. * * * To 'counter-sign' an instrument is to sign what has already been signed by a superior; to authenticate by an additional signature. * * * The absence of the counter-signature of an agent to an insurance policy does not render the policy inoperative where the intention that it should be effective is otherwise sufficiently plain. * * * The counter-signing of the policy was a matter for the insurance company. The insured had no duty with respect thereto. In the very nature of things, the failure

> of the insurer to perform such act cannot be made the basis of defense against liability."

To the same effect, see 15 Appleman, *Insurance Law & Practice,* § 8257; 16 Appleman, *supra,* § 9143; 17 Appleman, *supra,* § 9442; *Continental Casualty Co. v. Monarch Transfer & Storage Co.,* 23 S.W.2d 209 (Mo. App., 1930); *State ex rel Chorn v. Hudson,* 222 S.W. 1049 (Mo. App., 1920).

Plaintiffs' assertion that defendant Buffalo Insurance Co.'s policy is void for want of countersignature by Hansen & Rowland puts them in an impossibly inconsistent position. Their entire case depends upon the enforcibility of Endorsement No. 2 to the Certificate of Insurance which extended the operating period of the PACIFIC QUEEN through the date of the explosion, which was unsigned (R. 85). If the act of affixing an original signature to that endorsement is purely ministerial and does not affect the enforcibility of the endorsement, how can a mere countersignature on a policy treated by plaintiffs' brokers in exactly the same way as the admittedly valid policies of defendants Utah Home and Atlas go to the validity of the Buffalo policy?

The policy (Ex. 281-1), provides:

> "No suit or action on this Policy for the recovery of any claim shall be sustainable in any Court * * * unless commenced within *twelve months* next after the calendar date of *the happening of the physical loss* or damage out of which the said claim arose * * *." (Emphasis added)

The loss occurred September 17, 1957. This suit was brought May 11, 1960, over two and one-half years later.

The limitation contained in the Buffalo policy is specifically authorized by RCW 48.18.200(1) (3), which provides that:

> "In contracts of * * * marine * * * insurance, such

limitation shall not be to a period of less than one (1) year from the date of the loss."

In *Hafner v. Great American Insurance Co.*, 126 Wash. 390, 218 Pac. 206 (1923), an almost identical policy limitation was upheld:

> "We have uniformly held that a clause in such a contract fixing a limitation of the time in which suit is sustainable is a valid one." 126 Wash. 390 at 391.

To the same effect, see *Hassett v. Pennsylvania Fire Ins. Co.*, 150 Wash. 502, 273 Pac. 145 (1929).

It is respectfully submitted that the portion of the Complaint directed at defendant, Buffalo Insurance Company,

I. There Is No Merit to PQF's Asserted Theory That They Were Wrongfully Denied a Jury Trial in No. 2348

PQF, in their Brief on appeal, raise for the first time the wholly new issue that they were denied a trial by jury as a matter of right in No. 2348, the companion case which was ultimately consolidated for trial with the principal cause, No. 2543.

1. Underwriters submit raising this new issue is not timely:

a. PQF's only reference to jury trial in their Statement of Points is No. 2 (R. 297a):

> "2. The Court erred in denying plaintiffs' Motion for Jury Trial on September 28, 1960."

They now change this Point in the caption in their brief by deleting the reference to the date of the Court's decision (PQF Op. Br. 52). The Court had before it on September 28, 1960, only the issue of discretionary jury trial in No. 2543 under Rule 39(b), since timely demand was not made under Rule 38(b) (R. 312, third paragraph; Augmented Record,[1] Items 3, 4 and 5; R. 224). PQF has now presum-

[1] Underwriters Motion to Augment the Record, dated March 26, 1962, served and filed March 27, 1962, attached five items as described therein.

ably abandoned any claim of error in the Court's decision of September 28, 1960, denying discretionary jury trial (R. 224) F.R.Civ.P. 39(b) since this issue is not mentioned in their brief.

b. Nor did PQF's Statement of Points (R. 297a-h) claim error in the Court's Finding that:

> "III. Trial to the Court. Trial was to the Court. A jury trial was tardily asked in No. 2543, but was held to have been waived because demand was not timely. *No jury trial was demanded in No. 2348.* At plaintiffs' request, the two cases were consolidated for trial." (Emphasis added) (R. 251)

c. In view of PQF's abandonment of any claimed abuse of discretion by the Trial Court in its decision of September 28, 1960, and of their failure to attack Finding III in their Statement of Points, Underwriters submit there is no issue with respect to jury trial now properly before this Court. An appellate court will not normally consider an issue raised for the first time on appeal.

> *United States v. Marshall*, 230 F.(2d) 183, 193 (CA 9, 1956);
>
> *Hebets v. Scott,* 152 F.(2d) 739, 741, (CA9, 1945);
>
> *Humble Oil Co. v. Martin,* 298 F.(2d) 163, 168 (CA5, 1961) (Adv. Sh.);
>
> 3 *Am. Jur.,* Appeal and Error, § 246, pp. 25-32.

2. However, in order to dispel any doubt as to the lack of substance in PQF's new contention, Underwriters will briefly consider the issue on its merits.

a. Underwriters respectfully submit the contention is wholly without merit. On September 26, 1960, at the time set by the Court to hear oral argument on PQF's Motion under Rule 39(b) for jury trial of No. 2543, PQF, as a complete surprise to Underwriters (Augmented Record, Item 5, p. 3), on their own initiative moved to return to the Fed-

eral Court No. 2348, which was then pending as a State Court action having been earlier remanded, and to consolidate it with No. 2543 (R. 223). Counsel for PQF addressed the Court as follows:

> "Let us put them all in one basket, and I still think this court erred, [presumably in denying remand of No. 2543 (R. 128)] but that is neither here nor there. It is done, so let us put them together and try them in that fashion." (Augmented Record, Item 5, p. 2)

No question was raised by PQF concerning jury trial of No. 2348. That this could hardly be oversight is evident, for immediately following the Court's approval of PQF's motion to consolidate the two actions, they argued that a discretionary jury trial should be granted in No. 2543 under Rule 39(b). Not a single reference was made in 52 pages of transcript of that day's argument to any *right* to jury trial in No. 2348 (Augmented Record, Item 5). If PQF really believed there was substance to the contention now raised, it was needless to argue that the Court should grant a discretionary jury trial in No. 2543. Jury trial would have been theirs in the consolidated case as a matter of right, not of discretion.

There can be no dispute that PQF fully understood the issue was to be limited to the matter of discretion in No. 2543. Their Memorandum in Support of Motion for Jury Trial (Augmented Record, Item 3) served that same day, September 26, 1960, just before PQF made their motion to consolidate, conceded—

> " * * * plaintiffs may not have a jury trial as of right. However, this Court in its discretion may upon proper application grant an order placing the matter upon the Civil Jury Calendar. The authority for such an order lies in Rule 39(b) of the Federal Rules of Civil Procedure * * *. Plaintiffs have moved the court *for such*

> *an order* and submit this brief in support of their application." (Augmented Record, Item 4, pp. 1-2).

PQF then took the Court's time to hear argument and consider briefs restricted to Rule 39(b). Instead of presenting this novel contention for fair consideration by the Court and Underwriters, PQF remained mute on their new theory until their cause had been fairly lost after a prolonged, meticulous trial over seventeen days and after extensive post trial proceedings held by the Court to settle the Findings and Conclusions. If seasonably advised, the District Court would have weighed the matter with some deliberateness in considering its then assigned calendar (Augmented Record, Item 2). See *American Life Ins. Co. v. Stewart,* 300 U.S. 203, 215-16 (1937). But not until their Opening Brief on Appeal did PQF choose to speak out on this contention.

b. In any event, PQF never perfected a jury demand either in the State Court under Washington statutes or in the Federal Court under the Federal Rules of Civil Procedure. PQF err in claiming they had *"perfected"* their right to jury trial in "accordance with Rules of Practice in the Superior Court of the State of Washington." (PQF Op. Br. 50). The right to jury trial in the State Court is governed by RCW 4.44.100. This statute expressly requires that a statement electing jury trial be both served and *filed* and a jury fee paid. Unless such statement *"is filed"*

> " * * * the parties shall be deemed to have *waived* trial by jury and *consented* to a trial by court." (See Appendix IV.)

While PQF served a jury demand on July 22, 1960, they never filed it. Hence, any right to jury trial in the State Court was never perfected. As a result, not only did the Federal Court have no notice of the now claimed right to jury in No. 2348 when PQF moved to consolidate on Sep-

tember 26, 1960, but also the Federal Court Clerk had no notice when on October 28, 1960, PQF complied with the Clerk's request to—

> "physically remove the files of [No. 2348] from the superior court and file them with the Clerk of the Federal Court for the purpose of the consolidated trials which are to commence on October 31, 1960." (R. 46-7).

Nor was any such demand ever filed in Federal Court in No. 2348 pursuant to Rule 5(d), F.R. Civ. P., which required PQF to file any jury demand *"within a reasonable time."* The importance of *filing* a jury demand is emphasized by Rule 38(d), F. R. Civ. P., which specifically requires that a jury demand be filed pursuant to Rule 5(d) and, upon failure to do so, applies the penalty of waiver of trial by jury; 1 *Moore's Federal Practice,* 1353; 1 *Barron & Holtzoff, Federal Practice and Procedure,* 769. At no time did PQF file a jury demand as required by the Federal Rules. Therefor, whatever relevance Rule 81(c) could possibly have to the anomalous circumstance where the *plaintiffs* seek to have a pending State court action tried in the Federal Court, PQF can obtain no support from that Rule for their new theory that they were improperly denied a jury in No. 2348 in view of the fact they never perfected any such right in No. 2348 in either the State or Federal Court proceedings.

c. Lastly, PQF presented a stipulation on October 31, 1960, just before trial in the District Court (R. 48) the purpose of which was to make the Pre-Trial Order in No. 2543 applicable also to No. 2348. It provided in part:

> "* * * *since the issues and contentions of the parties are the same or similar* * * * the pretrial order heretofore entered in Cause No. 2543 * * * shall be deemed * * * applicable to and controlling upon issues of this case * * * but * * * (shall) not foreclose either party from

> the right or privilege of * * * *making any contention which is necessary to the proper presentation of that party's case* * * *.*'' (R. 48)

At the time this Stipulation was entered, PQF again remained silent with respect to any new ''contention'' of right to jury trial in No. 2348. It made no such ''contention'' whatsoever.

> ''* * * it is a well recognized rule of frequent application that a party litigant many not sit quiet at the time action is taken in the trial court and then complain on appeal. He is required to indicate in some appropriate manner his objection or dissent.''
>
> *Occidental Petroleum Corp. v. Walker,* 289 F.(2d) 1, 6 (CA10, 1961).

See also:

> *Gilby v. Travelers Insurance Company,* 248 F.2d 794 at 797 (CA8, 1957);
>
> *Weiss v. Duro Chrome Corp.,* 207 F.2d 298, 300 (CA 8, 1953).

The court properly heard the consolidated cases as non-jury cases, and no error or prejudice exists.

VII. CONCLUSION

It is respectfully submitted the appeal should be dismissed, or the judgment affirmed for violations of this Court's rules; or that the judgment should be affirmed on the merits on each of the grounds briefed above; and Underwriters should be allowed their costs and disbursements herein.

Dated at Seattle, Wash., April 6, 1962.

ALBERT E. STEPHAN
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APPENDICES

APPENDIX I

MARINE INSURANCE ACT, 1906[1]

6 Edw. 7, c. 41

Marine Insurance

Marine insurance defined

1. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

Marine adventure and maritime perils defined

3.—(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where—

(a) Any ship goods or other movables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";

(b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

[1] Excerpts from 2 Arnould, Marine Insurance (1954) 1186 ff. See F. F. XVII A; R. 277.

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

Insurable Interest

* * *

Insurable interest defined

5.—(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

When interest must attach

6.—(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:

Assignment of interest

15. Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not affect a transmission of interest by operation of law.

Disclosure and Representations

Insurance is uberrimae fidei

17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Disclosure by assured

18.—(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:—

(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superflous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is

not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

Disclosure by agent effecting insurance

19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

Representations pending negotiation of contract

20.—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the differ-

ence between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good fatih.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

When contract is deemed to be concluded

21. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

* * *

Warranties, etc.

Nature of warranty

33.—(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

When breach of warranty excused

34.—(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

Express warranties

35.—(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

* * *

Warranty of seaworthiness of ship

39.—(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the

commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all repects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

* * *

Warranty of legality

41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

* * *

Policy effected through broker

53.—(1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

(2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such

person, unless when the debt was incurred he had reason to believe that such person was only an agent.

Effect of receipt on policy

54. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.

Loss and Abandonment

Included and excluded losses

55.—(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular,—

(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, in-

herent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

Partial and total loss

56.—(1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

APPENDIX II

"TANKER ACT" [2]

§ 391a. Vessels having on board inflammable or combustible liquid cargo in bulk

(1) Vessels included

All vessels, regardless of tonnage, size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, that shall have on board any inflammable or combustible liquid cargo in bulk, except public vessels owned by the United States, other than those engaged in commercial service, shall be considered steam vessels for the purposes of title 52 of the Revised Statutes and shall be subject to the provisions thereof: *Provided,* That this section shall not apply to vessels having on board only inflammable or combustible liquid for use as fuel or stores or to vessels carrying liquid cargo only in drums, barrels, or other packages.

(2) Rules and regulations for handling liquid cargo

In order to secure effective provision against the hazards of life and property created by the vessels to which this section applies, the Commandant of the Coast Guard shall establish such additional rules and regulations as may be necessary with respect to the design and construction, alteration, or repair of such vessels, including the superstructures, hulls, places for stowing and carrying such liquid cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; and with respect to the handling and stowage of such liquid cargo; the manner of such handling or stowage,

[2] From 46 U.S.C.A. § 391a.

and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life-saving and fire protection; and with respect to the operation of such vessels; and with respect to the requirements of the manning of such vessels and the duties and qualifications of the officers and crews thereof; and with respect to the inspection of all the foregoing. In establishing such rules and regulations the Commandant of the Coast Guard may adopt rules of the American Bureau of Shipping or similar American classification society for classed vessels insofar as such rules pertain to the efficiency of hulls and the reliability of machinery of vessels to which this section applies. In establishing such rules and regulations, the Commandant of the Coast Guard shall give due consideration to the kinds and grades of such liquid cargo permitted to be on board such vessel.

(3) Hearing before approval of rules

Before any rules and regulations, or any alteration, amendment, or repeal thereof, are approved by the Commandant of the Coast Guard under the provisions of this section, except in an emergency, the said Commandant shall publish such rules and regulations and hold hearings with respect thereto on such notice as he deems advisable under the circumstances.

(4) Certificate of inspection and permit required; time of indorsing permit; inspection; duration of permit; vessels of foreign-nations; permit for prohibited materials

No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations established hereunder, have on board such liquid cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes and until a permit has been

endorsed on such certificate of inspection by the Coast Guard, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations established hereunder, and showing the kinds and grades of such liquid cargo that such vessel may have on board or transport. Such permit shall not be endorsed by the Coast Guard on such certificate of inspection until such vessel has been inspected by the Coast Guard and found to be in compliance with the provisions of this section and the rules and regulations established hereunder. For the purpose of any such inspection approved plans and certificates of class of the American Bureau of Shipping or other recognized classification society for classed vessels may be accepted as evidence of the structural efficiency of the hull and the reliability of the machinery of such classed vessels except as far as existing law places definite responsibility on the Coast Guard. A permit issued under the provisions of this section shall be valid for a period of time not to exceed the duration of the certificate of inspection on which such permit is endorsed, and shall be subject to revocation by the Coast Guard whenever it shall find that the vessel concerned does not comply with the conditions upon which such permit was issued: *Provided,* That the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States: *And provided further,* That no permit shall be issued under the provisions of this section authorizing the presence on board any vessel of any of the materials expressly prohibited from being thereon by subsection (3) of section 170 of this title.

(5) Shipping documents required on board; contents

Vessels subject to the provisions of this section shall

have on board such shipping documents as may be prescribed by the Commandant of the Coast Guard indicating the kinds, grades, and approximate quantities of such liquid cargo, on board such vessel, the shippers and consignees thereof, and the location of the shipping and destination points.

(6) Number of officers and tankermen; certificate as tankerman; suspension or revocation of certificate

(a) In all cases where the certificate of inspection does not require at least two licensed officers, the Coast Guard shall enter in the permit issued to any vessel under the provisions of this section the number of the crew required to be certificated as tankermen.

(b) The Coast Guard shall issue to applicants certificates as tankerman, stating the kinds of liquid cargo the holder of such certificate is, in the judgment of the Coast Guard, qualified to handle aboard vessels with safety, upon satisfactory proof and examination, in form and manner prescribed by the Commandant of the Coast Guard, that the applicant is in good physical condition, that such applicant is trained in and capable efficiently to perform the necessary operations aboard vessels having such liquid cargo on board, and that the applicant fulfills the qualifications of tankerman as prescribed by the Commandant of the Coast Guard under the provisions of this section. Such certificates shall be subject to suspension or revocation on the same grounds and in the same manner and with like procedure as is provided in the case of suspension or revocation of licenses of officers under the provisions of section 239 of this title.

(7) Penalties

The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of

them, who shall voliate the provisions of this section, or of the rules and regulations established hereunder, shall be subject to a fine of not more than $1,000 or imprisonment for not more than one year, or both such fine and imprisonment.

(8) Effective date of rules and regulations

The rules and regulations to be established pursuant to this section shall become effective ninety days after their promulgation unless the Commandant of the Coast Guard shall for good cause fix a different time. R.S. 4417a as added June 23, 1936, c. 729, 49 Stat. 1889, and amended Oct. 9, 1940, c. 777, § 3, 54 Stat. 1028; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.

APPENDIX III

CARRIAGE OF EXPLOSIVES OR DANGEROUS SUBSTANCES ACT[3]

170. Regulation of carriage of explosives or other dangerous articles on vessels — Vessel defined

(1) The word "vessel" as used in this section shall include every vessel, domestic or foreign, regardless of character, tonnage, size, service, and whether self-propelled or not, on the navigable waters of the United States, including its Territories and possessions, but not including the Panama Canal Zone, whether arriving or departing, or under way, moored, anchored, aground, or while in drydock; it shall not include any public vessel which is not engaged in commercial service, nor any vessel subject to the provisions of section 391a of this title, which is constructed or converted for the principal purpose of carrying inflammable or combustible liquid cargo in bulk in its own tanks: *Provided,* That the provisions of subsection (3) of this section shall apply to every such vessel subject to the provisions of section 391a of this title, which is constructed or converted for the principal purpose of carrying inflammable or combustible liquid cargo in bulk in its own tanks.

Passenger-carrying vessel defined

(2) The phrase "passenger-carrying vessel" as used in this section, when applied to a vessel subject to any provision of the International Convention for Safety of Life at Sea, 1929, means a vessel which carries or is authorized to carry more than twelve passengers.

Transportation, etc., of certain explosives prohibited

(3) It shall be unlawful knowingly to transport,

[3] From 46 U.S.C.A. § 170 ff.

carry, convey, store, stow, or use on board any vessel fulminates or other detonating compounds in bulk in dry condition, or explosive compositions that ignite spontaneously or undergo marked decomposition when subjected for forty-eight consecutive hours to a temperature of one hundred and sixty-seven degrees Fahrenheit, or compositions containing an ammonium salt and a chlorate, or other like explosives.

Transportation, etc., of certain high explosives on passenger-carrying vessels prohibited; exceptions

(4) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use on board any passenger-carrying vessel any high explosives such as, and including, liquid nitroglycerin, dynamite, trinitrotoluene, picrates, detonating fuzes, fireworks that can be exploded en masse, or other explosives susceptible to detonation by a blasting cap or detonating fuze, except ships' signal and emergency equipment, and samples of such explosives (but not including liquid nitroglycerin) for laboratory or sales purposes in restricted quantities as may be permitted by regulations of the Commandant of the Coast Guard established hereunder.

Same; non-passenger-carrying vessels

(5) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use on board any vessel other than a passenger-carrying vessel, any high explosive referred to in subsection (4) of this section except as permitted by the regulations of the Commandant of the Coast Guard established hereunder.

Transportation, etc., of other explosives or other dangerous articles; exceptions

(6) (a) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use (except as fuel for its

own machinery) on board any vessel, except one specifically exempted by paragraph (b) of this subsection, any other explosives or other dangerous articles or substances, including inflammable liquids, inflammable solids, oxidizing materials, corrosive liquids, compressed gases, poisonous articles or substances, hazardous articles, and ships' stores and supplies of a dangerous nature, except as permitted by the regulations of the Commandant of the Coast Guard established hereunder: *Provided,* That all of the provisions of this subsection relating to the transportation, carrying, conveying, storing, stowing, or use of explosives or other dangerous articles or substances shall apply to the transportation, carrying, conveying, storing, stowing, or using on board any passenger vessel of any barrels, drums, or other packages of any combustible liquid which gives off inflammable vapors (as determined by flash-point in open cup tester as used for test of burning oil) at or below a temperature of one hundred and fifty degrees Fahrenheit and above eighty degrees Fahrenheit.

(b) This subsection shall not apply to—

(i) vessels not exceeding fifteen gross tons when not engaged in carrying passengers for hire;

(ii) vessels used exclusively for pleasure;

(iii) vessels not exceeding five hundred gross tons while engaged in the fisheries;

(iv) tugs or towing vessels: *Provided, however,* That any such vessel, when engaged in towing any vessel that has explosives, inflammable liquids, or inflammable compressed gases on board on deck, shall be required to make such provisions to guard against and extinguish fire as shall be prescribed by the Commandant of the Coast Guard;

(v) cable vessels, dredges, elevator vessels, fireboats, ice-breakers, pile drivers, pilot boats, welding vessels, salvage and wrecking vessels;

(vi) inflammable or combustible liquid cargo in bulk: *Provided, however,* That the handling and stowage of any inflammable or combustible liquid cargo in bulk shall be subject to the provisions of section 391a of this title.

Regulations for protection against hazards created by explosives or other dangerous articles

(7) In order to secure effective provisions against the hazards of health, life, limb, or property created by explosives or other dangerous articles or substances to which subsections (3)-(5) or (6) of this section apply—

(a) The Commandant of the Coast Guard shall by regulations define, describe, name, and classify all explosives or other dangerous articles or substances, and shall establish such regulations as may be necessary to make effective the provisions of this section with respect to the descriptive names, packing, marking, labeling, and certification of such explosives or other dangerous articles or substances; with respect to the specifications of containers for explosives or other dangerous articles or substances; with respect to the marking and labeling of said containers; and shall accept and adopt for the purposes above mentioned in this subsection such definitions, descriptions, descriptive names, classifications, specifications of containers, packing, marking, labeling, and certification of explosives or other dangerous articles or substances to the extent as are or may be established from time to time by the Interstate Commerce Commission insofar as they apply to shippers by common carriers engaged in interstate or foreign commerce by water. The Commandant of the Coast Guard shall also establish regula-

tions with respect to the marking, handling, storage, stowage, and use of explosives or other dangerous articles or substances on board such vessels; with respect to the disposition of any explosives or other dangerous articles or substances found to be in an unsafe condition; with respect to the necessary shipping papers, manifests, cargo-stowage plans, and the description and descriptive names of explosives or other dangerous articles or substances to be entered in such shipping documents; also any other regulations for the safe transportation, carriage, conveyance, storage, stowage, or use of explosives or other dangerous articles or substances on board such vessels as the Commandant of the Coast Guard shall deem necessary; and with respect to the inspection of all the foregoing mentioned in this paragraph. The Commandant of the Coast Guard may utilize the services of the Bureau for the Safe Transportation of Explosives and Other Dangerous Articles, and of such other organizations whose services he may deem to be helpful.

(b) The transportation, carriage, conveyance, storage, stowage, or use of such explosives or other dangerous articles or substances shall be in accordance with the regulations so established, which shall insofar as applicable to them, respectively, be binding upon shippers and the owners, charterers, agents, masters, or persons in charge of such vessels, and upon all other persons transporting, carrying, conveying, storing, stowing, or using on board any such vessels any explosives or other dangerous articles or substances: *Provided,* That this section shall not be construed to prevent the transportation of military or naval forces with their accompanying munitions of war and stores.

(c) Nothing contained in this section shall be construed to relieve any vessel subject to the provisions of

this section from any of the requirements of title 52 (secs. 4399 to 4500, inclusive) of the Revised Statutes or Acts amendatory or supplementary thereto and regulations thereunder applicable to such vessel, which are not inconsistent herewith.

(d) Nothing contained in this section shall be construed as preventing the enforcement of reasonable local regulations now in effect or hereafter adopted, which are not inconsistent or in conflict with this section or the regulations of the Commandant of the Coast Guard established hereunder.

(e) The United States Coast Guard shall issue no permit or authorization for the loading or discharging to or from any vessel at any point or place in the United States, its territories or possessions (not including Panama Canal Zone) of any explosives unless such explosives, for which a permit is required by the regulations promulgated pursuant to this section, are packaged, marked, and labeled in conformity with regulations prescribed by the Interstate Commerce Commission under section 835 of Title 18, and unless such permit or authorization specifies that the limits as to maximum quantity, isolation and remoteness established by local, municipal, territorial, or State authorities for each port shall not be exceeded. Nothing herein contained shall be deemed to limit or restrict the shipment, transportation, or handling of military explosives by or for the Armed Forces of the United States.

Masters, owners, etc., required to refuse unlawful transportation of explosives or other dangerous articles

(8) Any master, owner, charterer, or agent shall refuse to transport any explosives or other dangerous articles or substances in violation of any provisions of this section and the regulations established thereunder, and may require that any container or package which

he has reason to believe contains explosives or other dangerous articles or substances be opened to ascertain the facts.

Publication of, hearings on, and effective date of proposed regulations

(9) Before any regulations or any additions, alterations, amendments, or repeals thereof are made under the provisions of this section, except in an emergency, such proposed regulations shall be published and public hearings with respect thereto shall be held on such notice as the Commandant of the Coast Guard deems advisable under the circumstances. Any additions, alterations, amendments, or repeals of such regulations shall, unless a shorter time is authorized by the Commandant of the Coast Guard, take effect ninety days after their promulgation.

Tendering explosives or other dangerous articles for shipment without divulging true character or in violation of section

(10) It shall be unlawful knowingly to deliver or cause to be delivered, or tender for shipment to any vessel subject to this section any explosives or any other dangerous articles or substances defined in the regulations of the Commandant of the Coast Guard established hereunder under any false or deceptive descriptive name, marking, invoice, shipping paper, or other declaration and without informing the agent of such vessel in writing of the true character thereof at or before the time such delivery or transportation is made. It shall be unlawful for any person to tender for shipment, or ship on any vessel to which this section applies, any explosives or other dangerous articles or substances the transportation, carriage, conveyance, storage, stowage, or use of which on board vessels is prohibited by this section.

Exemption of vessels from section or regulations when compliance unnecessary for safety

(11) The Commandant of the Coast Guard may exempt any vessel or class of vessels from any of the provisions of this section or any regulations or parts thereof established hereunder upon a finding by him that the vessel, route, area of operations, conditions of the voyage, or other circumstances are such as to render the application of this section or any of the regulations established hereunder unnecessary for the purposes of safety: *Provided,* That except in an emergency such exception shall be made for any vessel or class of vessels only after a public hearing.

Agencies charged with enforcement

(12) The provisions of this section and the regulations established hereunder shall be enforced primarily by the Coast Guard of the Department of the Treasury; which with the consent of the head of any executive department, independent establishment, or other agency of the Government, may avail itself of the use of information, advice, services, facilities, officers, and employees thereof (including the field service) in carrying out the provisions of this section: *Provided,* That no officer or employee of the United States shall receive any additional compensation for such services, except as permitted by law.

Detention of vessels pending compliance with section and regulations; penalty for false swearing

(13) Any collector of customs may, upon his own knowledge, or upon the sworn information of any reputable citizen of the United States, that any vessel subject to this section is violating any of the provisions of this section or of the regulations established hereunder, by written order served on the master, person in

charge of such vessel, or the owner or charterer thereof, or the agent of the owner or charterer, detain such vessel until such time as the provisions of this section and of the regulations established hereunder have been complied with. If the vessel be ordered detained, the master, person in charge, or owner or charterer, or the agent of the owner or charterer thereof, may within five days appeal to the Commandant of the Coast Guard, who may, after investigation, affirm, set aside, or modify the order of such collector. If any reputable citizen of the United States furnishes sworn information to any collector of customs that any vessel, subject to this section, is violating any of the provisions of this section or of the regulations established hereunder, and such information is knowingly false, the person so falsely swearing shall be deemed guilty of perjury.

Violation of section or regulations; penalty; liability of vessel

(14) Whoever shall knowingly violate any of the provisions of this section or of any regulations established under this section shall be subject to a penalty of not more than $2,000 for each violation. In the case of any such violation on the part of the owner, charterer, agent, master, or person in charge of the vessel, such vessel shall be liable for the penalty and may be seized and proceeded against by way of libel in the district court of the United States in any district in which such vessel may be found.

Same; increased penalty in event of personal injury or death

(15) When the death or bodily injury of any person results from the violation of this section or any regulations made in pursuance thereof, the person or persons who shall have knowingly violated or caused to be vio-

lated such provisions or regulations shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * R. S. § 4472; Feb. 27, 1877, c. 69, § 1, 19 Stat. 252; Feb. 20, 1901, c. 386, 31 Stat. 799; Feb. 18, 1905, c. 586, 33 Stat. 720; Mar. 3, 1905, c. 1457, § 8, 33 Stat. 1031; May 28, 1906, c. 2565, 34 Stat. 204; Jan. 24, 1913, c. 10, 37 Stat. 650; Mar. 4, 1913, c. 141, § 1, 37 Stat. 736; Oct. 22, 1914, c. 336, 38 Stat. 766; Mar. 29, 1918, c. 30, 40 Stat. 499; Mar. 2, 1925, c. 387, 43 Stat. 1093; Oct. 9, 1940, c. 777, § 1, 54 Stat. 1023; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097; July 16, 1952, c. 887, 66 Stat. 730.

APPENDIX IV

LAWS OF WASHINGTON RE JURY TRIAL AND WAIVER[4]

4.44.100 Jury trial—Fee—Waiver. In all civil actions triable by a jury in the superior court any party to the action may, at or prior to the time the case is called to be set for trial, serve upon the opposite party or his attorney, and file with the clerk of the court a statement of himself, or attorney, that he elects to have such case tried by jury. At the time of filing such statement such party shall also deposit with the clerk of the court twelve dollars, which deposit, in the event that the case is settled out of court prior to the time that such case is called to be heard upon trial, shall be returned to such party by such clerk. Unless such statement is filed and such deposit made, the parties shall be deemed to have waived trial by jury, and consented to a trial by the court: *Provided,* That, in the superior courts of counties of the first class such parties shall serve and file such statement, in manner herein provided, at any time not later than two days before the time the case is called to be set for trial. [1909 c 205 § 1; 1903 c 43 § 1; RRS § 316. FORMER PARTS OF SECTION: Code 1881 § 248 now in RCW 4.48.010.]

[4] From Revised Code of Washington.

APPENDIX V

Record References to Possibly Challenged Findings of Fact

"II.

"Identity of Parties and Amounts Involved.

"A. Each plaintiff is a resident and citizen of either the State of Washington or of the State of California. The named plaintiffs (except The Bank of California, N. A., which held a ship mortgage) were partners doing business in the State of Washington under the assumed business name of 'Pacific Queen Fisheries' and owned and operated the D/V PACIFIC QUEEN. The other persons, George Hull, William Peck and O. E. Royer, designated in No. 2543 as 'additional parties at the instance of the Court,' and in No. 2348 as 'additional plaintiffs,' are residents and citizens of the State of Washington and *each of them had acquired interests in 'Pacific Queen Fisheries'* from John Breskovich, one of the named plaintiffs, when he sold portions of his interest to them in 1951-53 (Exs. 369 ff).[1]"

[1] R. 331, 333, 334, 337, 1519-1522, 1619-1620; Exs. 369-370, 372-377 (PQF federal income tax returns), and Exs. 379-381 (letters), all of which were designated but not printed.

"III.

"Trial to the Court.[1]

"Trial was to the Court. A jury trial was tardily asked in No. 2543, but was held to have been waived because the demand was not timely[2]. *No. jury trial was demanded in No. 2348*[3]. At plaintiffs' request the two cases were consolidated for trial[4]."

[1] Finding III was not challenged by PQF's Specification of Points (R. 297 a-h).

[2] R. 95ff at 108, 108ff at 110, 169, 298ff at 312, 224ff.

[3] R. 51-52.

[4] R. 46-50.

"VI.

"Loss by Gasoline Explosion.

"The Pacific Queen became a total constructive loss on September 17, 1957, because of a violent *gasoline* explosion.[1] One of two crew members quartered aboard the vessel lost his life[2]. The other escaped and was one of the principal witnesses at the subsequent Coast Guard hearing described below[3]."

[1] R. 513-516, 643-668 (background), 669-683, 751-757, 824-839, 853-858, 1029-1036, 1047-1050, 1051-1085, 1088-1091, 1277-1278, 1301-1302, 1303-1304.
[2] R. 1069, 1081.
[3] R. 1115-1121.

"IX.

"B. *But any evidence of this is incredible.* As recently as June, 1960, at a pre-trial deposition, plaintiffs' counsel stipulated that any such alterations in gas tank facilities were made some time *after* the end of the 1955 season and *before* the beginning of the 1957 season[1]. The 1957 season did not begin until May 24, 1957, when 8,000 gallons of gasoline were loaded aboard before the Pacific Queen sailed to Alaska. *In other respects plaintiffs' evidence on this matter was conflicting and obscure*[2]. *It is impossible to fix the exact date of these changes because the owners failed to come forward with any information until very late, and the information then offered was exceedingly vague and unsatisfactory.*"

[1] R. 1346-1347.
[2] R. 988-989, 1246-1247, 1331, 1334-1336, 1339, 1501-1502, 1611-1612, 1620.

"IX.

"C. *Based upon all of the evidence, the Court finds that, at some date subsequent to the 1955 survey, and prior to the attachment date of the insurances on May 24, 1957, the plaintiff owners and managers of the vessel had increased the*

gasoline-carrying capacity of the PACIFIC QUEEN *from approximately 3,000 gallons to 8,000 gallons*[1]. This alone was a material increase in the risk *which was not disclosed to the Underwriters*[2]."

[1] R. 1246, 1346-1347, 1611-1612.
[2] R. 770-776, 779-782, 940, 944-945, 947-949, 1356, 1363. 1444-1448.

"IX.

"D. An even greater *undisclosed* increase in the risk was accomplished at that same time by making the following extremely hazardous alterations in the method of discharging gasoline[1]. Plaintiffs inserted interior below-deck exposed gasoline-discharge valves into fittings that had been designated and used for insertion of permanently secured drainage plugs[2]. These valve replacements were located in or near a passageway where ship's equipment, fishing gear and personnel frequently passed[3]."

[1] R. 772-776, 947-948, 1269-1270, 1356, 1376-1377, 1486-1487, 1675-1680.
[2] R. 1124-1125, 1405-1406, 1420-1421, 1486-1487, 1569-1573, 1583-1584, 1586-1587, 1612.
[3] R. 1144-1147, 1405-1406, Ex. 201 (model).

"X.

"Plaintiffs failed to Disclose these Material Increases in the Risk to Hansen & Rowland or to Defendants.

"A. Plaintiff August Mardesich *was the Manager* of the PACIFIC QUEEN in 1957. He was not quartered or employed aboard the vessel in any capacity[1]. He had personal knowledge of the gasoline tank and discharge changes which rendered the vessel extremely hazardous[2] and which materially increased the risk[3]. Neither he nor any of the other partners disclosed these changed conditions to the Underwriters[4]."

[1] R. 325, 337, 976, 982-983, 994, 1314-1316, 1334, 1501, 1582-1583, 1596.
[2] R. 1420-1421, 1569-1571, 1608-1612.
[3] R. 1124-1125, 1405-1406, 1420-1421, 1486-1487, 1569-1573, 1583-1584, 1586-1587, 1608-1612.
[4] R. 770-776, 779-782, 940, 944-945, 947-949, 1356, 1363, 1444-1448.

"X.

"B. *The increased gasoline capacity and the hazardous modifications of the discharge system were not made at a time or under circumstances such as to bring them to either the actual or the constructive notice of the Underwriters.*[1]"

[1] Finding IX B on the circumstances of the modifications is not challenged directly or implicitly; R. 779-782, 919-937, 988-989, 1192, 1198-1208, 1246, 1330-1331, 1334-1339, 1346-1347, 1501-1502, 1537-1538, 1561-1565, 1611-1612, 1620, 1627-1630; Exs. 16, 17, 363.

"X.

"D. Neither Marquat, now deceased, who made an insurance survey in 1955, nor Elkins, since retired, who made the survey in 1957, knew of the increased gasoline capacity or of the unsafe and improper gasoline-discharge facilities at the time of their respective surveys[1], *and there was nothing observable by any reasonable inspection which would have disclosed the changes.*"

[1] Findings IX A and IX B on the date of the modifications are not challenged directly or implicitly, so Marquat, who surveyed the vessel before they were made, could not have known of them; as to Elkins, see Ex. 17 and R. 1192, 1198-1208, 1537-1538, 1561-1565.

"X.

"J. Each of the changes constituted a material increase in the risk *which was concealed from and not disclosed to defendants*[1]."

[1] R. 770-776, 779-782, 787, 830-833, 844-846, 919-937, 940, 944-945, 947-949, 988-989, 1124-1125, 1144-1145, 1192, 1198-1208, 1246, 1269-1270, 1330-1331, 1334-1339, 1346-1347, 1356, 1363, 1376-1377, 1405-1406, 1420-1421, 1444-1448, 1501-1502, 1537-1538, 1561-1565, 1569-1573, 1578-1579, 1583-1584, 1586-1587, 1594-1596, 1611-1613, 1617-1619, 1627-1630, 1656-1658, 1683-1684, 1689.

"XI.

"*The* PACIFIC QUEEN *was repeatedly sent to Sea in an Unseaworthy State with the Privity of the Owners.*

"A. *The* PACIFIC QUEEN *was unseaworthy each time she was sent to sea on and after May 24, 1957.* The PACIFIC QUEEN

was unseaworthy when she left for her 1957 voyage by reason of the hazardous condition caused by the increased gasoline-carrying capacity and, to an even greater extent, by reason of the changed method of piping, valving and internal methods of discharge of gasoline. This system was grossly unsafe and improper, and created a great and serious hazard to life and property[1]. The owners were privy to this unseaworthiness, and knew of these conditions and neglected to take reasonable precaution to correct these deficiencies and to make her seaworthy[2]."

[1] R. 772-776, 830-833, 844-846, 925, 1047-1050, 1269-1270, 1569-1573, 1583-1584, 1586-1587, 1594-1596, 1656-1658, 1677-1680.

[2] R. 554, 982-983, 987-992, 994, 1150-1151, 1246, 1336-1339, 1537-1538, 1564-1567, 1608-1613, 1617-1620.

"XI.

"B. After the PACIFIC QUEEN returned from Alaska, she shifted to various Puget Sound docks and was then sent *to sea* from Seattle to Friday Harbor, Washington. The hazardous gasoline condition remained uncorrected, and she was still in an unseaworthy state with privity and knowledge of her owners, and of her manager.[1]"

[1] R. 571-574, 845-846, 994, 1009, 1127-1128, 1425-1428, 1543-1546, 1617-1620; Ex. 438—designated but not printed.

"XI.

"E. The vessel was sent *to sea with the privity of the owners and managers* in an unseaworthy condition from Friday Harbor to Seattle where she remained a few days exposed to the same hazards and tied up at an oil dock where great hazard to life and property was continuously threatened.[1] She then was again sent to sea from Seattle to Tacoma under the same extremely hazardous condition.[2]"

[1] R. 977-982, 996-997, 1167-1170, 1426-1427, 1558-1560, 1688.

[2] R. 1167-1170, 1427-1428.

"XI.

"F. By reason of the continuing hazardous and unsafe

method of discharging gasoline and by reason of the failure properly to clean up after the Friday Harbor spill, the PACIFIC QUEEN was again sent *to sea* in an unseaworthy condition when she left Seattle for Tacoma two days prior to her explosion and loss.[1]''

[1] R. 1167-1170, 1427-1428.

''XI.

''G. The day after her arrival at Tacoma, while still in such perilous and unseaworthy condition *with the privity and knowledge of her assured owners and managers,* she exploded and became a constructive total loss with loss of life and destruction of property.[1] Her continuous unseaworthiness until her fatal explosion was a proximate cause of her loss.''

[1] R. 199, 554, 571-574, 772-776, 830-833, 844-846, 925, 977-983, 987-992, 994, 996-997, 1009, 1047-1085, 1088-1091, 1127-1128, 1150-1151, 1167-1170, 1246, 1269-1270, 1336-1339, 1425-1428, 1537-1538, 1543-1546, 1558-1560, 1564-1567, 1569-1573, 1583-1584, 1586-1587, 1594-1596, 1608-1613, 1617-1620, 1656-1658, 1677-1680, 1688.

''XII.

''*The Destruction of the* PACIFIC QUEEN *was Caused by a Gasoline Explosion.*

''A. *Based on the overwhelming preponderance of the evidence,* the constructive total loss of the PACIFIC QUEEN was the result of a *gasoline* explosion. *There is no credible or reasonable direct evidence or inference from the evidence to the contrary. The explosion was of gasoline and gasoline vapors from the prior spill into the interior of the vessel at Friday Harbor. The fire which followed the destructive explosion was primarily of this gasoline and gasoline vapors feeding on the wooden members of the then shattered hulk of the* PACIFIC QUEEN *as she was sinking to the shallow bottom. But the explosion had already caused such extensive wreckage as to render her a constructive total loss irrespective of the subsequent gasoline flames touched off by the ex-*

plosion which engulfed the wrecked vessel and though intense were soon extinguished.[1]''

[1] R. 513-516, 669-683, 751-757, 824-839, 853-858, 1029-1036, 1051-1085, 1088-1091, 1277-1278, 1301-1304, 1487-1488.

''XII.

''B. *There is no credible evidence of arson.*[1] *The Tacoma Fire Department, the Tacoma Police Department,* and the United States Coast Guard *all* made extensive investigations and none found any basis for such a conclusion. *No further evidence whatsoever as to arson or other wrongful acts by third persons was adduced in the extensive pre-trial depositions, or at trial; and the Court finds there is no basis in fact for any such contentions. The explosion was due to accumulated gas vapors that created a most perilous condition, and to accidental ignition possibly by the deceased crew member or some other chance spark.''*

[1] R. 1027-1030, 1078-1079, 1268-1269, 1302, 1489-1490.

''XII.

''C. *There was no pre-existing fire in the* Paqific Queen *preceding the explosion.*[1] *The gasoline explosion was the proximate cause of the constructive total loss of the vessel.*[2] *The source of ignition is unknown. It could have been a spark from a cigarette, or a match, or an electric contact, or other accidental source; but the explosion resulted from a want of due diligence by the assured owners and managers to remedy the extremely hazardous conditions which existed from the time of the gasoline spill.*[3]''

[1] R. 675-676, 820-830, 857-858, 1491; trial court viewed the vessel.
[2] R. 513-516, 669-683, 751-757, 824-839, 853-858, 1029-1036, 1051-1085, 1088-1091, 1277-1278, 1301-1304, 1487-1488.
[3] R. 857, 1027-1030, 1082, 1090-1091, 1302.

''XII.

''D. *The possibility that it was an ammonia explosion is, at the very best, not any more than remote and unlikely*

speculation.[1] Captain Buckler's testimony to the effect that he now believes the explosion to have been of ammonia origin was arrived at shortly before trial in conference with plaintiff's counsel, and without his being in possession of any additional facts other than those on which, a few months earlier, he had based his prior written survey opinion that the cause of the explosion was unknown.[2] Plaintiffs' expert witness, Mr. Sax, based his opinion that the explosion was of ammonia origin on an inadequate examination of the vessel and on assumed facts which were not supported by the evidence.[3]''

[1] R. 675-680, 699-702, 744-745, 751-753, 758-759, 1277, 1305.
[2] R. 401-406.
[3] R. 490-496, 506-507, 512-516, 520-522, 805.

''XII.

''E. Testimony, introduced by the plaintiffs, of witnesses living within a few hundred feet of the explosion, who were immediately awakened and could observe its inception, reported a ball of orange fire and of black smoke at the time of the explosion.[1] Such a characteristic is consistent only with an explosion of gasoline vapor origin. *It is not consistent with one of ammonia origin.* Plaintiffs' expert, Mr. Sax, also concedes this fact.[2] *The ammonia odor at the scene of the catastrophe was from ammonia remnants in a refrigeration system that had previously been completely pumped down.*[3] The odor is very noxious and can arise from small traces or quantities.[4]''

[1] R. 1094-1101, 1163-1166.
[2] R. 512-516, 521, 759-761.
[3] R. 744.
[4] R. 506-507, 755-756.

''XII.

''F. Moreover, and more importantly, the theory of an ammonia explosion is based entirely upon the additional hypothesis that a severe fire existed in the engine room prior to the explosion. *The Court's personal examination*

aboard the hulk of the Pacific Queen *and the photographs in evidence show, beyond the slightest question, that no fire existed in the engine room prior to the time that the forward bulkhead in the engine room was blown off its flanges. This occurred at the time of the explosion. The char in the engine room and behind the flanges is easily explicable by the fury of the fire after the explosion. This is illustrated by the photographs taken by Mr. Kollar.*[1]''

[1] R. 675-676, 820-830, 857-858.

''XII

''H. *The peculiar internal system of ventilation and the path of air on the* Pacific Queen, *unaided by mechanical ventilation, so graphically illustrated at the time of the Friday Harbor spill, resulted in the presence in the upper port forward engine room of an explosive mixture of gasoline vapors with air at the time of the explosion which mixture was the explosive agent and cause of the loss of the* Pacific Queen.[1]''

[1] R. 707-713, 715-726, 728-729, 742-743, 836-840.

''XIII.

''*The Owners and Manager of the* Pacific Queen *Did Not Use Due Diligence to Prevent the Loss of the* Pacific Queen *by Explosion.*

''A. Some of the owners and the manager of the Pacific Queen, Mardesich, were privy to, and had thorough knowledge of the dangerous conditions aboard the Pacific Queen from the time 8,000 gallons of gasoline were loaded in May, 1957, to the date of the explosion on September 17, 1957. The owners and the manager, Mardesich, failed to use due diligence and were grossly negligent in preventing the loss of the Pacific Queen by explosion in at least two respects:

''1. First, as outlined above, at some time between 1955 and May 24, 1957, they were privy to and knew they had converted the gasoline discharge facilities of the Pacific

Queen in such fashion as they became totally improper and unsafe.[1] This improper and unsafe system was a proximate cause of the explosion and resultant destruction of the vessel.[2]

"2. Second, the owners and manager of the Pacific Queen *were privy to the Friday Harbor spill and failed to use due diligence and were grossly negligent* in the steps taken towards cleaning up the results of the Friday Harbor gasoline spill and to purge the vessel and its structures of gasoline and gasoline vapors, all with the actual knowledge and acquiescence and direction of owner *and manager Mardesich, as well as of owner,* superintendent and chief engineer Jasprica.[3]"

[1] Findings IX A and IX B on the modifications are not challenged directly or implicitly. Nor is either of the findings denominated IX D. Since appellants caused the modifications, they were privy to them.

[2] Findings XI C and XI D on the Friday Harbor spill are not challenged directly or implicitly; R. 199, 513-516, 554, 571-574, 669-683, 751-757, 772-776, 824-839, 844-846, 853-858, 925, 977-983, 987-992, 994, 996-997, 1009, 1029-1036, 1047-1085, 1088-1091, 1127-1128, 1150-1151, 1167-1170, 1246, 1269-1270, 1301-1304, 1336-1339, 1425-1428, 1487-1488, 1537-1538, 1543-1546, 1558-1560, 1564-1567, 1569-1573, 1583-1584, 1586-1587, 1594-1596, 1608-1613, 1617-1620, 1656-1658, 1677-1680, 1688.

[3] Finding XI C on the Friday Harbor spill is not challenged directly or indirectly; R. 199, 554, 571-574, 772-776, 830-833, 844-846, 925, 977-983, 987-992, 994, 996-997, 1009, 1047-1085, 1088-1091, 1122, 1127-1128, 1150-1151, 1153, 1167-1170, 1241-1242, 1246, 1269-1270, 1336-1339, 1425-1428, 1529-1531, 1537-1538, 1543-1546, 1558-1560, 1564-1567, 1569- 1573, 1583-1584, 1586-1587, 1594-1596, 1608-1613, 1617-1620, 1656-1658, 1677-1680, 1688.

"XIII.

"B. The *manager,* Mr. Mardesich, *was especially privy to all of these conditions.* He knew of the alterations of the tanks[1]; of the loading of 8,000 gallons of gasoline [2]; of the extreme hazard of exposed interior valves; and of the serious gasoline spill at Friday Harbor [3]; and he personally inspected the vessel at that time, *but he failed to exercise due diligence to purge her of gasoline and fumes,* or to remove the remaining bulk gasoline, or to make any gas-

free tests, or to secure and plug the drain-valves in the other tanks.[4] Considering the serious nature of the spill, the measures taken by the owners and manager to purge the PACIFIC QUEEN of gasoline and gasoline vapors were not adequate in the exercise of due diligence.[5]''

[1] R. 989-995, 1124-1125, 1405-1406, 1420-1421, 1486-1487, 1569-1573, 1583-1584, 1586-1587, 1608-1612.

[2] R. 1501, 1582-1583.

[3] Finding XI C on the Friday Harbor spill is not challenged directly or implicitly.

[4] Finding XI C on the Friday Harbor spill is not challenged directly or implicitly.

[5] Finding XI C on the Friday Harbor spill is not challenged directly or implicitly.

''XIII.

''C. *The subsequent explosion and destruction of the* PACIFIC QUEEN *were proximately caused by these failures by the owner or manager to use due diligence.*[1] *This failure to use due diligence was with the privity and knowledge of the owners, and of the manager, Mardesich.* He was fully informed but treated the hazardous loading, stowage, and subsequent large spill of gasoline with such a casual indifference *as to amount to gross negligence and an extraordinary want of due diligence.''*

[1] Finding XI C on the Friday Harbor spill is not challenged directly or implicitly; R. 199, 513-516, 554, 571-574, 669-683, 751-757, 772-776, 1036, 1047-1085, 1088-1091, 1127-1128, 1150-1151, 1167-1170, 1246, 824-839, 844-846, 853-858, 925, 977-983, 987-992, 994, 996-997, 1009, 1029, 1036, 1047-1085, 1088-1091, 1127-1128, 1150-1151, 1167-1170, 1246, 1269-1270, 1277-1278, 1301-1304, 1336-1339, 1425-1428, 1487-1488, 1537-1538, 1543-1546, 1558-1560, 1564-1567, 1569-1573, 1583-1584, 1586-1587, 1594-1596, 1608-1613, 1617-1620, 1656-1658, 1677-1680, 1688.

''XV.

''*The* PACIFIC QUEEN *was in Continuing Violation of the Tanker Act Through the Fishing Season of 1957.*

''A. In 1957 gasoline was carried as cargo. It was sold to some independent fishermen.[1] It was one of the conces-

sions given to other independent fishermen to get them to fish for the PACIFIC QUEEN.[1] More than 4% of the 8,000 gallons of gasoline carried to Alaska was sold to independent fishermen Pearson and Vistad. This amount constituted more than 6% of the number of gallons of gasoline actually used in the 1957 fshing season by the PACIFIC QUEEN.[1]''

[1] R. 1421-1423, 1507-1516, 1518-1519, 1532-1534, 1596.

''XVIII.

''A gasoline explosion by accidental source was reasonably foreseeable.

''A gasoline explosion such as that which happened was reasonably foreseeable in the exercise of due diligence by the owners and managers of the PACIFIC QUEEN. *The vessel permeated with gasoline fumes was a 'floating time bomb' which would explode by a spark from any source.* She lay at a public dock frequented by ships' personnel, fishermen, sightseers, and visitors. In the summertime, is 'loaded' with people 'who go for recreation' and 'plenty of lovers sometimes go to park' (Ex. 233, Nevens, pp. 12-13). With knowledge that this vessel was *permeated with gasoline fumes,* and in a frequented public place, the owners and manager took no steps to provide a watchman or warn crew members not to smoke or light matches, etc. *The explosion was reasonably foreseeable in the exercise of ordinary care or reasonable diligence.''*[1]

[1] This is a summary of numerous preceding findings and is supported by the evidence cited for Findings XI, E-G, XII A, C, and XIII and by Finding XI C on the Friday Harbor spill, which was not challenged directly or indirectly.

APPENDIX VI

TABLE OF EXHIBITS

"R" references are to printed Record; "TP" references are to the original typed Transcript of Proceedings where relevant material is not in printed Record.

Exhibit Number Pl.	Def.	*Identified*	*Offered*	*Received in Evidence*	*Rejected*
2		TP 40	TP 40	TP 40	
3		"	"	"	
4		"	"	"	
5		"	"	"	
6		R 348	R 348	R 351	
7		"	"	"	
8		"	"	"	
9		"	"	"	
10		"	"	"	
11		"	"	"	
12		"	"	"	
13		"	"	"	
14		"	"	"	
15		"	"	"	
16		"	"	"	
17		"	"	"	
18		"	"	"	
19		"	"	"	
20		"	"	"	
21		"	"	"	
22		"	"	"	
23		"	"	"	
24		"	"	"	
25		"	"	"	
26		"	"	"	
27		R 348	R 348	R 351	
28		"	"	"	
29		"	"	"	
30		"	"	"	
31		"	"	"	
32		"	"	"	
33		"	"	"	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
34		R 348	R 348	R 351	
35		"	"	"	
36		"	"	"	
37		"	"	"	
38		"	"	"	
39		"	"	"	
40		"	"	"	
41		"	"	"	
42		"	"	"	
43		"	"	"	
44		R 349	R 349	"	
45		"	"	"	
46		"	"	"	
46-1		TP 444	TP 444	TP 444	
49		R 348	R 348	R 351	
52		"	"	"	
55		"	"	"	
58		TP 40	TP 40	TP 40	
76		R 386	TP 170	TP 170	
77A		TP 300-301	TP 303	TP 303	
77B		TP 301-303	"	"	
77C-F		TP 303	"	"	
77G		TP 310	TP 310	TP 311	
	77A1	TP 695-696	TP 698	TP 698	
80		TP 524			
81		R 781	R 782	R 782	
82		TP 1075	TP 1076	TP 1080	
87		R 963	R 963	R 963	
	201	R 357	R 357	R 357-358	
	202	"	"	"	
	203	"	"	"	
	204	R 649	R 649	R 649-650	
	204	R 357	R 357	R 357-358	
	205	"	"	"	
	213	TP 705	TP 705	TP 705	
	214	TP 1094	TP 1094	TP 1097	
	215	"	"	"	
	216	"	"	"	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
	217	TP 1094	TP 1094	TP 1095	
	218	"	"	"	
	219	"	"	"	
	236	TP 1097	TP 1097		TP 1097
	237	R 518	R 519	R 519	
	238	R 470-471	R 471	R 471	
	238-1	TP 433	TP 433	TP 434	
	239	R 518	R 519	R 519	
	240	TP 441	TP 441-442	TP 442	
	241	TP 1182	TP 1180	TP 1187	
	242	"	"	"	
	243	"	"	"	
	244	"	"	"	
	245	TP 1183	"	"	
	246	"	"	"	
	247	"	"	"	
	248	"	"	"	
	249	"	"	"	
	250	"	"	"	
	251	"	"	"	
	252	"	"	"	
	253	"	"	"	
	254	"	"	"	
	255	TP 1188	"	TP 1188	
	256	TP 1189	"	TP 1189	
	257	"	"	"	
	258	"	"	"	
	259	"	"	"	
	260	"	"	"	
	261	"	"	"	
	262	"	"	"	
	263	TP 1189	TP 1180	TP 1189	
	264	TP 1180	TP 1180	TP 1180	
	265	TP 1098	TP 1098	TP 1099	
	266	"	"	"	
	267	"	"	"	
	268	"	"	"	
	269	"	"	"	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
	270	TP 1098	TP 1098	TP 1099	
	271	TP 1086	TP 1086	TP 1087	
	274	TP 1099	TP 1099	TP 1099-1100	
	275	"	"	"	
	277	"	TP 1100-1101	TP 1101	
	278	"	TP 1100	"	
	279	"	TP 1101	"	
	280	"	"	"	
	281	R 880	R 883-884	R 885	
	287	TP 1191-1192	TP 1191-1192		TP 1192
	288	"	"		"
	289	"	"		"
	290	"	"		"
	291	"	"		"
	292	"	"		"
	293	"	"		"
	294	"	"		"
	294-1	TP 1193	TP 1193		TP 1193
	295	TP 1193-1194	TP 1193-1194	TP 1194	
	296	"	"	"	
	297	"	"	"	
	298	"	"	"	
	299	"	"	"	
	300	"	"	"	
	301	"	"	"	
	302	"	"	"	
	302-B	R 961	TP 1435	TP 1436	
	303	TP 1193-1194	TP 1193-1194	TP 1194	
	304	"	"	"	
	305	"	"	"	
	306	"	"	"	
	307	"	"	"	
	308	"	"	"	
	309	"	"	"	
	310	"	"	"	
	311	"	"	"	
	312	"	"	"	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
	313	TP 1193-1194	TP 1193-1194	TP 1194	
	314	"	"	"	
	315	TP 1194-1195	TP 1194-1195		TP 1195
	316	TP 1196	TP 1195	TP 1196-1197	
	317	"	"	"	
	318	"	"	"	
	319	TP 1196	TP 1195	TP 1196-1197	
	320	"	"	"	
	321	"	"	"	
	322	TP 1195-1196	TP 1195	TP 1196	
	323	TP 1413	TP 1413	TP 1413-1414	
	324	"	"	"	
	325	"	"	"	
	326	"	"	"	
	327	"	"	TP 1415	
	328	TP 1414	TP 1414	"	
	329	"	"	"	
	330	"	TP 1414-1415	"	
	331	"	TP 1415		Not admitted—TP 1415
	332	TP 1416	TP 1416	TP 1416	
	333	"	"	"	
	334	"	"	"	
	335	"	"	TP 1417	
	336	TP 1417	TP 1417	"	
	337	"	"	TP 1417-1418	
	338	TP 1418	TP 1418	TP 1418	
	339	"	"	"	
	340	"	"	"	
	341	"	"	"	
	342	"	"	"	
	343	"	"	"	
	353	TP 791	TP 791	TP 792	
	358	"	TP 792	"	
	361	"	"	"	
	361A	TP 793	TP 793	TP 793	
	363	TP 1354	TP 1354	TP 1354	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
	363A	TP 1102-1103	TP 1102-1103	TP 1103	
	365	TP 1103	TP 1103	TP 1104	
	366	"	"	"	
	367	"	"	"	
	368	"	"	"	
	369	R 332	R 338	R 338-339	
	370	R 332-333	"	"	
	371	R 333	"	"	
	372	"	"	"	
	373	R 334	"	"	
	374	"	"	"	
	375	R 335	"	"	
	376	R 336-337	"	"	
	377	R 338	"	"	
	377-1	TP 1104	TP 1104	TP 1104-1105	
	378	TP 1105	TP 1105	TP 1105	
	379	"	"	"	
	380	"	"	"	
	381	"	"	"	
	382	TP 1107-1108	TP 1107-1108	TP 1108	
	383	TP 1105-1106	TP 1105	TP 1106	
	384	"	"	"	
	385	"	"	"	
	386	"	"	"	
	387	TP 1106	"	TP 1107	
	388	TP 1107	"	"	
	389	"	"	"	
	390	R 607	R 607	R 610	
	391	"	"	"	
	392	"	"	"	
	393	"	"	"	
	394	"	"	"	
	395	"	"	"	
	397	"	"	"	
	398	"	"	"	
	399	"	"	"	
	400	R 608	R 608	"	
	401	"	"	"	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
	402	R 608	R 608	R 610	
	403	"	"	"	
	405	"	"	"	
	406	R 609	R 609	"	
	407	"	"	"	
	408	"	"	"	
	409	"	"	"	
410		R 610	R 610	R 610	
	411	TP 1090	TP 1090		TP 1092
	412	"	"		"
	413	"	"		"
	414	"	"		"
	415	"	"		"
	416	"	"		"
	417	"	"		"
	418	"	"		"
	419	"	"		"
	420	"	"		"
	421	TP 1092	TP 1092		"
	422	"	"		"
	423	"	"		"
	424	"	"		"
	425	"	"		"
	426	"	"		"
	427	"	"		"
	428	"	"		"
	429	"	"		"
	430	"	"		"
	431	"	"		"
	432	"	"		"
	433	"	"		"
	434	"	"		"
	435	TP 1092	TP 1092		TP 1092
	436	"	"		"
	437	R 453	R 453	R 453	
	438	R 581	R 582	R 583	
	439-1	TP 625	TP 626	TP 626	
	440	R 1004	R 1004		TP 1508
	441	R 998	"	R 1005	
	441A	R 998, 1005	"	"	

Exhibit Number					
Pl.	*Def.*	*Identified*	*Offered*	*Received in Evidence*	*Rejected*
	444	TP 696	TP 698	TP 698	
	444 1-3	TP 697-698	"	TP 698	
	445	R 609	R 609	R 610	
	446	"	"	"	
	447	TP 845	TP 845	TP 845	
	448	TP 909	TP 909	TP 910	
	449	TP 975-976	TP 976	TP 976	
	450	"	"	"	
	451	R 822	R 823	R 823	
	452A-F	R 824-825	R 825	R 825	
	453	R 882-883	R 883	R 884	
	454	TP 1294	TP 1294	TP 1295	
	454 1-3	R 896-897	TP 1293	TP 1294	
	455	TP 1305-1306	TP 1306	TP 1306	
	456	R 904	TP 1321	TP 1321	
	457	TP 1386	TP 1386	TP 1386	